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Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment during Economic Crises

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CONFLICT OF TREATIES, INTERPRETATION, AND DECISION-MAKING ON HUMAN RIGHTS AND INVESTMENT DURING ECONOMIC CRISSES

Diane A. Desierto

Abstract:

This article explores the problem of human rights compliance amid the host State’s investment obligations during economic emergencies. It focuses on the narrow problematic of achieving compliance with the “minimum core obligation” under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) despite the simultaneous pendency of the investment treaty obligation of a host State to provide compensation to investors for breaches of expropriation and non-expropriation provisions in an investment treaty. Part I (ICESCR Applicability in Economic Emergencies) establishes the continuing binding force of the ICESCR minimum core obligation during economic emergencies, and the determinability of its content on a case-to-case basis by States Parties to the ICESCR. Part II (Conflict of Treaties and VCLT Article 30: the ICESCR and the Investment Treaty) of the article then proceeds to show that host States’ authoritative decision-makers could view the situation as one of direct incompatibility between treaty norms, which should trigger the application of Article 30 of the Vienna Convention on the Law of Treaties (VCLT), and not a counter-productive argument based on the alleged “jus cogens” nature of the ICESCR. Part III (VCLT Article 31 and ICESCR-Sensitive Investment Treaty Interpretation) demonstrates an alternative, where the host State treats the situation as one calling for harmonization of investment treaty standards with the ICESCR, although this method may be more suitable to the “in accordance with host State law” clauses in investment treaties, as opposed to the usual guarantees of fair and equitable treatment (FET) or non-discrimination. Part IV (The Principle of Political Decision: Host States and the Realist Calculus of Treaty Compliance) examines an alternative scenario where the host State finds itself restrictively besieged during an economic emergency, to the extent that using its fiscal resources to perform one international obligation would utterly incapacitate it from performing the other at the same time. Faced as such with the “principle of political decision”, the article shows that the preference of authoritative decision-makers cannot be made ex ante but only according to the contextual parameters of its particular exigency, taking into account the elements of the established process of authoritative decision-making. In the Conclusion (Investment, Welfare, and Economic Emergencies), I show that the new generations of international investment agreements (IIAs) have begun to purposely design human rights-sensitive provisions in the substantive guarantees of these treaties, which may suggest areas for future research.

1 Research conducted under the University of Michigan Law School and Center for Comparative and International Law’s 2012 Grotius Research Fellowship. A shorter version of this article was published first in the September 2012 issue of the Manchester Journal of International Economic Law.

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INTRODUCTION: AUTHORITATIVE DECISION-MAKERS IN ECONOMIC CRISSES

For those who subscribe to the view that “[t]he core purpose of the State is protection”\(^3\), there is always a compelling case for government intervention during economic emergencies – when markets fail and the supposed self-corrections of the business cycle are not forthcoming; when jobs are lost and whole industries are decimated in a downward spiral due to lack of price competitiveness; and most especially, when the costs of basic services becomeastronomic, making immediate economic relief and social protection a matter of national urgency.\(^4\) Such is the persuasive force of contemporary interventions for the public interest, that when the Obama Administration announced a massive fiscal stimulus package to address the American economic crisis in 2008, Nobel Prize-winning economist Joseph Stiglitz famously declared, “We are all Keynesians now.”\(^5\)

Four years later and deep into the Eurozone debt crisis, the protective logic of government intervention in economic emergencies resonates just as powerfully. Led by the political alliances of German Chancellor Angela Merkel and French President Nicolas Sarkozy, European states have accepted direct intergovernmental intervention in crisis-beset jurisdictions within the Eurozone.\(^6\) As two scholars aptly observed in relation to recent international economic emergencies, governments’ emergency measures are now very likely to fall under three broad categories: “(1) measures

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designed to bolster the stability of the financial services industry; (2) measures directed at the financial services industry but [are] structured to increase the availability of credit to other sectors of the economy; and (3) measures targeting select and strategic industries”.

Thus far, European governments appear to be drawing from this Neo-Keynesian basket of emergency policy prescriptions.

Government intervention during economic emergencies mounts a sensitive challenge to the sufficiency of market wisdom to address income inequality, but also invites thoughtful scrutiny into the conventional orthodoxies of neoliberal economic governance. This is never more evident than in the international investment law regime, which, in the past decade, has faced its own share of criticisms against its systemic legitimacy and empirical salience to actual economic development.

Critics allege the lack of transparency and democratic accountability in international investment treaty-making and investment arbitration; the biased procedures and outcomes that supposedly favor investors predominantly over host States and their constituents; and most importantly, the diminution of governments’ domestic policy and regulatory spaces due to the commitments they assume under international

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9 See representative views and critiques against different features of the investment arbitration practice, procedure, and process in MICHAEL WAIBEL, ASHA KAUSHAL, KYO-HWA LIZ CHUNG, AND CLAIRE BALCHIN (EDS.), *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Kluwer Law International, 2010).


investment agreements (IIAs).\textsuperscript{12} As a consequence, the “legitimacy” literature in international investment law has evolved into a burgeoning self-reflexive dialectic between scholars, practitioners, and policy-makers on ideas for systemic reform.\textsuperscript{13}

Following withdrawals by other South American states such as Bolivia (2007) and Ecuador (2009), Venezuela’s acrimonious exit from the International Centre for Settlement of Investment Disputes (ICSID) in January 2012\textsuperscript{14} further fueled the “legitimacy” debate in international investment law. The criticisms prove particularly acute during economic emergencies, when the duty to protect the social and economic rights of the civilian is expected to dominate a State’s public policy agenda. In this context, there are evidently competing visions of how government must “respect, observe, protect, and fulfill”\textsuperscript{15} the social and economic rights of its citizens, amid an influx of investor claims against the State’s international responsibility:

“Tensions obviously arise when States alter policy and industrial/commercial regulations as a direct consequence of their intent to quell social instability, meet basic social needs (and perhaps in some

\textsuperscript{12} See Stephan W. Schill, \textit{Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach}, 52 Virg. J. Int’l L. 1 (2011), pp. 57-102 at p. 66 (“Host states are particularly concerned about a shrinking of domestic policy space occasioned by vague standards of investment protection, which are interpreted, partly in inconsistent ways, by international arbitrators who exercise significant interpretative powers over the content of investment treaty obligations, and who are de facto even able to restrict the policy choices made by democratically-elected legislators, without themselves enjoying a robust democratic mandate.”)


\textsuperscript{15} See MAGDALENA SEPULVEDA, \textit{THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS} (Interseitnia, 2003), at pp. 212-246 [hereafter, \textit{SEPULVEDA}].
cases, as a conscious decision to meet their obligations to protect the social and economic rights of communities that may be affected by general political, social and economic instability). It is when such policy choices encroach on the rights granted to international investors that we find cases going to arbitration panels.

The specific tension we are addressing in this article is whether necessary policy responses to general social or political instability that breach a contract signed between the State and a company should generate compensatory obligations. Or if on the contrary, in social and economic emergency situations that put the public interest or a specific vulnerable group at grave risk, if States’ international human rights obligations preempt its international investor contract obligations. As such, would not adjustments to public policy which are potentially detrimental to corporate investment agreements, but that are targeted to protect human rights in special circumstances, not be perfectly legitimate and generate attenuating circumstances that legitimize State breaches of international investment contractual obligations?  

To date, much of the investment law arbitral jurisprudence on economic emergencies derives from the 2001-2002 Argentine financial crisis, where, in over forty pending and/or concluded arbitrations, Argentina has repeatedly invoked a defense of necessity based on a bilateral investment treaty provision, and/or Article 25 of the ILC Articles on State Responsibility. This strategy has elicited mixed results to date. The majority of arbitral tribunals have rejected Argentina’s singularly unique use of the necessity defense to deny any degree of compensatory liability to investors.


for Argentine governmental measures imposed during the financial crisis.\textsuperscript{18}

In the arbitral awards that have been reported thus far, it does not appear that Argentina has sought mitigation of damages or exculpation of liability arising from its observance of minimum guarantees of international social and economic rights. Rather, it was the \textit{amicus curiae} brief in the \textit{Suez v. Argentina} case, submitted by five non-governmental organizations in 2007, which posited the first proposal during a live controversy, on a method of interpretation of fundamental social and economic rights in relation to a bilateral investment treaty.\textsuperscript{19} The thirty-page \textit{amicus} brief in \textit{Suez}\textsuperscript{20} identified the applicable human rights involved to be the right to water, right to life, and related rights. These human rights, according to the \textit{amici curiae}, form part of the relevant applicable law to the dispute as “rules of international law” under Article 42(1) of the ICSID Convention;\textsuperscript{21} and as such, could be read to assist in the interpretation of the “fair and equitable treatment” standard and the “indirect expropriation” standard in the bilateral investment treaty (BIT).\textsuperscript{22} The bulk of the analysis in the \textit{Suez} brief is devoted to developing the use of these social and economic rights to inform the interpretation of BIT standards.

argued that “[h]uman rights law could displace investment law in a conflict of norms situation…[which] could arise if the Tribunal were to find, for example, that the backdrop of a severe economic crisis, the guarantees offered to foreign investors with respect to the concession’s economic equilibrium were incompatible with the government’s duty to ensure access to water to the population.”

However, the amici found that resolving this conflict was “not necessary for the adjudication of the case…as the contextual interpretation of investment law provides avenues for accommodation and normative dialogue. Still, in such situation of normative conflict, the primacy of human rights may need to be recognized and given effect.”

It is this theory on alleged treaty conflicts that this Article proposes to explore in more detail. In times of economic emergencies when the social and economic rights of civilian populations are placed in severe risk, it would be helpful for the State’s authoritative decision-makers to identify their actual policy options and the attendant consequences arising from each option. As there is, to date, no investment arbitral award that squarely adjudicates social and economic rights alongside or within investment treaty obligations, there is little guidance, by way of past jurisprudential antecedents, that could help inform a future assessment or policy projection of the relationship between social and economic rights and investment treaty obligations. Absent a concrete controversy with specific legal issues, merely juxtaposing the vast swath of international social and economic rights found in international treaties and customary norms, vis-à-vis the differing permutations of substantive guarantees in investment treaties, would be an imprecise and highly speculative exercise.

To the extent that social and economic rights contained in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are asserted, however,

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23 Id. at p. 26.
24 Id. at p. 26.
I submit that it is possible to forecast some narrow policy solutions, albeit proceeding under some level of abstraction due to the absence of a concrete dispute. A more parsimonious experiment would be to focus on the minimum core obligation of States under the ICESCR to “ensure the satisfaction of, at the very least, minimum essential levels of each of the [ICESCR] rights”, and analyze how this obligation interacts with the standard investment treaty obligation to compensate investors for host State’s treaty breaches. As I show in Part I (ICESCR Applicability in Economic Emergencies), the minimum core obligation of the ICESCR remains applicable during an economic crisis. The Committee on Economic Social and Cultural Rights (CESCR) stressed that “even in times of severe resources constraints whether caused by the process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.” The absence of a provision in the ICESCR that is comparable to Article 4(1) derogation and public emergency provision of the International Covenant on Civil and Political Rights (ICCPR) does not materially affect the applicability of the ICESCR minimum core obligation. As has been rightly observed, the CESCR’s approach to emergency situations “confirms that the Covenant applies in all circumstances and that it is not necessary to derogate from the rights contained therein in order to deal with an emergency situation. In effect, the Committee seems to view the flexibility of article 2(1) (‘take steps to the maximum of available resources’) and article 4 ICESCR (general limitation clause), as sufficient tools to counter crisis situations.”


26 Id. at para. 12.

27 SEPÚLVEDA, at p. 297.
the ICESCR is the obligatory ‘floor’ that a State contends with in times of economic emergencies. It is this floor that I aim to juxtapose with the usual investment treaty obligation requiring a host State to compensate investors for breaches of substantive treatment standards.

For purposes of this Article, I thus focus on a narrow question that host State’s authoritative decision-makers could very likely face in the future during economic emergencies: whether the host State can plead non-compliance, mitigated compliance, or modified compliance with the investment treaty obligation to compensate, on the ground that the State’s public funds have been allocated to ensure the State’s compliance with the ICESCR’s minimum core obligation to provide essential levels of the ICESCR rights. From the vantage point of the host State’s authoritative decision-makers, compliance with the ICESCR and the IIA obligation to compensate appears as a matter of fiscal prioritization. Simply put, can the host State earmark public funds for social protection consistent with the ICESCR minimum core obligation, before it must pay off (in whole or in part) compensation to investors for the host State’s breach of its investment treaty obligations?

I explore three approaches to respond to this question. First, the ICESCR minimum core obligation could be treated as normatively incompatible with the investment treaty obligation, thus resulting in a conflict of treaties situation. As I show in Part II (Conflict of Treaties and VCLT Article 30: ICESCR and the Investment Treaty), while the amicus curiae brief in Suez asserted that a human rights treaty automatically displaces an investment treaty, the intuitive appeal of this argument is not yet affirmed by the international law of treaties. Hierarchy between treaties remains narrowly circumscribed under international law. Article 103 of the United Nations Charter provide for the supremacy of Charter obligations over all
other treaty obligations, but this hierarchy does not extend to the multilateral human rights treaties. Neither would *jus cogens* supremacy under VCLT Article 64 apply, since the ICESCR does not yet qualify as one of the few recognized *jus cogens* norms in international law.

Rather than refer to limited rules on normative hierarchy within international law, I submit that it is Article 30 of the Vienna Convention on the Law of Treaties (VCLT) that provides some guidance for resolving the conflict between the ICESCR minimum core obligation and the investment treaty obligation to compensate. VCLT Article 30 provides the rules for the application of successive treaties, but not treaty interpretation, which is governed by VCLT Article 31. Under this formulation, I explore how a host State can regard its ICESCR obligation and BIT obligation as a matter of prioritizing the *application* of one treaty over the other. This process, however, is not devoid of complexity. Where the ICESCR is the earlier treaty than the bilateral investment treaty (BIT), the application of VCLT Article 30(4) results in differentiated consequences. For the States who are parties to the BIT as well as the ICESCR, the ICESCR as the earlier treaty would apply “only to the extent that its provisions are compatible” with the provisions of the BIT. I show that the practical consequence of this rule is not necessarily to eliminate the BIT obligation to compensate, but at best, would be to adjust the quantum of compensation owed in light of the State’s fulfillment of its ICESCR minimum core obligation. However, if only one of the States Parties to the BIT is a party to both the BIT and the ICESCR, it is the BIT, as the “treaty to which both are parties”, that “governs their mutual rights and obligations”. Because the BIT applies exclusively to both States, the question of human rights compliance would then have to be framed within the interpretation of BIT standards.
This leads us to the second approach of human rights-sensitive treaty interpretation, which is predominantly discussed and favored in the literature on human rights in investment arbitration. In Part III (VCLT Article 31 and IESCR-Sensitive Investment Treaty Interpretation), I show how the ICESCR minimum core obligation could be used in the process of interpreting treatment standards in the investment treaty. As a “relevant rule of international law” under VCLT Article 31(3)(c), I examine how the ICESCR minimum core obligation could be used to inform the initial assessment of alleged investment treaty breaches. In addition to subsuming ICESCR protection within these standards, however, I also examine the potential for ICESCR-sensitive interpretation within the “legality” clause found in investment definitions in many IIAs. This “legality” clause usually provides that an investment is made “in accordance with the law of the host State”. Where a host State provides for the domestic incorporation of international human rights law in its jurisdiction, I submit that the ICESCR could also form part of the corpus of host State laws that should be complied with to qualify an “investment” as one protected by the investment treaty, including the treaty’s provisions for access to dispute settlement mechanisms such as investment arbitration. Admittedly, these interpretive proposals have not yet materialized in concrete adjudication. The recently-discontinued Piero Foresti et al. v. South Africa arbitration was a missed opportunity to examine potential amicus curiae submissions on the interpretation of social and economic rights alongside international investment obligations, as this was a rare instance where the arbitral tribunal granted the petitions of various non-governmental organizations

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28 See PIERRE-MARIE DUPUY, FRANCESCO FRANCIONI, AND ERNST-ÜLRICHT PETERSMANN (EDS.), HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Oxford University Press, 2009).


(including the Center for International Environmental Law and the International Commission of Jurists) to serve as non-disputing parties to the proceedings.  

**Part IV (The Principle of Political Decision: Host States and the Realist Calculus of Treaty Compliance)** shows that the third approach applies the “principle of political decision”, which anticipates the host State’s performance of both competing obligations according to the calculus of State interests and internal constituencies of the host State’s authoritative decision-makers. In a situation where neither obligation can be performed completely without undermining or imperiling the other, I submit that not only should the authoritative decision-maker consider the consequences of international responsibility arising from breach of either obligation, but also due regard must be paid to the institutional and political dynamics of the relevant internal and external constituencies, as well as the community expectations unique to the host State. Rejecting any degree of compensability outright, as Argentina continues to propose in its pending and concluded arbitrations, is a decision rife with political costs and international consequences. Article 54(1) of the ICSID Convention clearly obligates Contracting States to “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” A host State’s failure to comply with this provision arguably creates a “dispute on the application of [the ICSID] Convention” that could be elevated by any...

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of the ICSID Contracting States to the International Court of Justice.\textsuperscript{34}

Where economic emergencies lead to volatile situations such as widespread or universal loss of property values, States would more likely strategically negotiate compensation restructuring with investors, rather than declare a total default on the duty to compensate. Declaring a complete rejection of compensability has ripple negative effects on the host State’s future borrowing capacity,\textsuperscript{35} its ability to attract future economic partnerships and investment linkages, and also creates severe “outcasting”\textsuperscript{36} risks for the host State in future international cooperative arrangements. The likely political decision of the host State would thus probably aim to strike a negotiated haircut or deferment scheme for the payment of investor compensation.\textsuperscript{37} Moreover, the risk of economic emergencies is not alien from the history of sovereign debt transactions and practices, such that investors could never have anticipated, hedged, or insured against this risk. Some investors may find better recovery of their principal exposures outside of the protracted and costly process of dispute settlement by availing of alternative debt restructuring strategies.\textsuperscript{38} In this situation, the political decision to “breach” an investment treaty obligation to compensate, might be better managed by the State’s authoritative decision-makers if they can accurately forecast the commercial and political risks of the arbitral process;

\textsuperscript{34}ICSID Convention, Art. 64.
\textsuperscript{36}Yale Law Professors Oona Hathaway and Scott Shapiro coined the term “outcasting” to describe “denying the disobedient the benefits of social cooperation and membership”. See Oona Hathaway and Scott Shapiro, \textit{Outcasting: Enforcement in Domestic and International Law}, 121 Yale L. J. 252 (2011).
\textsuperscript{38}On the history of sovereign debt adjudication and/or related restructuring, see \textsc{Michael Waibel, Sovereign Defaults Before International Courts and Tribunals} (Cambridge University Press, 2011); \textsc{August Reinsich, State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring} (Wien: Böhlau, 1995).
the likelihood of economic recovery and its estimated duration; and the margins of tolerance of the domestic and international political elites for a host State deliberately choosing to “breach” the investment treaty duty to compensate.

In the Conclusion (*Investment, Welfare, and Economic Emergencies*), I observe that the new generation of IIAs have begun to take human rights protection into account, beginning with those concluded after the 2004 US Model BIT and the 2004 Canada Model Foreign Investment and Promotion Agreement (FIPA). Unlike previous IIA generations, the new structural design of IIAs – especially those from developing countries – seek to calibrate investment and human rights within the objective of achieving economic development, under more transparent procedures and joint initiatives between States Parties. These innovations in the new IIA generations have not yet been tested in concrete disputes, but they also serve as a further policy option for today’s authoritative decision-makers. Where the approaches of conflict of treaties, harmonized interpretation, or political decision, prove inadequate, a more long-term view of reconciling human rights in international investment law regime is to, perhaps, deliberately build rights-sensitive norms within the new IIAs, as some States have done, notably the United States and Canada. Ensuring ICESCR protection especially during economic emergencies will improve confidence in the necessity and relevance of the global investment law regime, consistent with reasserting the “welfarist and interventionist purposes of international law.”


“…International law of the inter-war years was not aimed solely at the social protection of certain categories of individuals within states, but also at remedying the position of economic weakness of states themselves, and underlying that, the embryonic idea of a necessary correction in the excessive inequalities between states if these were detrimental to the whole. To this end, a Financial Committee was set up within the framework of the League of Nations, which intervened in a quite novel way and on many occasions at the time to correct the economic and financial situation of failing states. As an example, Austria benefited from sporadic but effective aid from the Financial Committee so as to cope with the
I. ICESCR APPLICABILITY IN ECONOMIC EMERGENCIES

While ICESCR rights have been more prevalent objects of domestic judicial enforcement, they have not yet proven to be the decisive *lis mota* in contentious cases before the International Court of Justice (ICJ). It was only through an advisory opinion that the ICJ has explicitly articulated some aspects of the nature of ICESCR rights and a State’s likely breach of such rights. In the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice declared that Israel, as the Occupying Power, “is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”

In determining the legality of Israel’s construction of a wall on the occupied Palestinian territory, the Court considered the relevance of international human rights obligations, including several ICESCR provisions on the right to work, protection and assistance accorded to the family and to children and young persons, the right to an adequate standard of living, the right to be free from hunger, the right to health, and the right to education. Noting reports from various Special Rapporteurs of the United Nations Commission on Human Rights, the World Court pronounced that “it is of the opinion that the construction of the wall and its

collapse of its currency in 1920.

The first moves were made, then, to go beyond the formal equality between states so as to take account of their actual economic and social situation and support the most vulnerable of them….this great co-operative movement was the re-emergence of a welfarist and interventionist purpose of international law.”


42 Id. at p. 189, para. 131.
associated regime...impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social, and Cultural Rights...”.

Other than this advisory opinion, the World Court has not had the direct opportunity to adjudicate legal issues arising from ICESCR rights. Regional human rights instruments on economic, social and cultural rights (such as the African Charter on Human and Peoples’ Rights, the 1948 Charter of the Organization of American States, the 1969 American Convention of Human Rights, and the 1988 Additional Protocol on Economic, Social and Cultural Rights, and the revised European Social Charter) are enforced according to specific procedures and mechanisms defined in each respective treaty system.

International remedies for ICESCR violations thus partake more of the nature of individual complaints mechanisms, rather than traditionally litigated inter-State disputes. In December 2008, the UN General Assembly unanimously passed a resolution creating the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which enables the Committee on Economic, Social, and Cultural Rights to receive individual complaints for violations of such Covenant rights.

The Committee may request urgent interim measures from a State Party “as

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43 Id. at pp. 191-192, paras. 133 and 134.
49 See MASHOOD A. BADERIN AND ROBERT MCCORQUODALE (EDS.), ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION (Oxford University Press, 2007), at pp. 139-240.
may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.\textsuperscript{51} and after examination of the individual communication, could transmit its views to the State Party concerned for its consideration.\textsuperscript{52} The Committee also has the authority to conduct confidential inquiries on alleged grave or systematic violations by a State Party of Covenant rights, and can transmit such findings to the State Party concerned together with comments and recommendations.\textsuperscript{53} The Optional Protocol also has an inter-State communications procedure where a State Party can invite the attention of another State Party to the fulfillment of ICESCR obligations. The inter-State communications procedures will culminate with the issuance of a Committee report on the disputed matter.\textsuperscript{54} Lacking three more ratifying or acceding States Parties, the Optional Protocol to the ICESCR has not yet entered into force, having to date only 7 States Parties (Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Spain) and 39 signatory States.\textsuperscript{55}

The ICESCR retains its applicability even during economic emergencies. (For ease of reference, I refer to the broadest definition of economic emergencies to encompass “balance of payments” crises, “capital account” crises, “currency crises”, financial crises, liquidity and solvency crises.\textsuperscript{56}) Before proceeding to discuss the actual contours of the applicable ICESCR rights, it is first important to distinguish the nature of the general State obligations assumed under the ICESCR. Article 2(1) of

\textsuperscript{51} Id. at Art. 5.
\textsuperscript{52} Id. at Arts. 7-8.
\textsuperscript{53} Id. at Art. 11.
\textsuperscript{54} Id. at Art. 10.
\textsuperscript{56} DESIERTO 2012, at pp. 148-149.
the International Covenant on Civil and Political Rights (ICCPR) expressly provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant….”\(^{57}\)

Article 2(1) of the ICESCR frames the general obligation of the State very differently from the general obligation “to respect and to ensure” in ICCPR Article 2(1):

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”\(^{58}\)

The Committee on Economic, Social and Cultural Rights (CESCR) explains the obligation “to take steps” as one that should be “deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant,”\(^{59}\) with the means to be used to fulfill the obligate to take steps being “all appropriate means, including particularly the adoption of legislative measures.”\(^{60}\) Other possible appropriate measures may include, and are not limited to, “administrative, financial, educational and social measures.”\(^{61}\) Most importantly, the CESCR held that the “principal obligation of result reflected in article 2(1) is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the Covenant.”\(^{62}\)

The CESCR explained “progressive realization” in the following terms:

“…The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this

\(^{57}\) ICPR, Art. 2(1).  
\(^{58}\) ICESCR, Art. 2(1). Italics added.  
\(^{60}\) Id. at para. 3.  
\(^{61}\) Id. at para. 7.  
\(^{62}\) Id. at para. 9.
sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

What is most important in this general obligation of States to “take steps” is that the State should observe the irreducible minimum core obligation that exists as the raison d'être of the ICESCR:

“10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

[...]”

63 Id. Underscoring in the original.
12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes…

It is significant to note that the minimum core obligation takes into account not just the State’s available resources, but also those resources over which the State exercises *jus disponendi* (right to dispose). Identifying the exact content of the minimum core obligation in each and every case is not a static process, but rather, one that purposely accepts evolution according to need, scientific and technological advancement, among others. Nonetheless, the legal parameters of “essential levels” or “core content” of ICESCR obligations are determinable. The *minimum core obligation* refers to the essential level of each ICESCR right, “without which a right loses its substantive significance as a human right.” Manisuli Ssenyonjo describes the minimum core obligation as an “absolute international minimum”:

“…is a minimum core relative (state-specific), universal, or relatively universal? While there are different views on this issue, there would be no point in having a minimum core of state responsibility if it were state-specific and not universal. *The minimum core content* that gives rise to the *minimum core obligations* is, therefore, that part of a right, which must be respected and protected at all times, whatever the state’s level of development and resources. It is an absolute international minimum, and constitutes a basic level of subsistence necessary to live in dignity…. The minimum core can, therefore, be seen as a ‘base-line’, below which all states must not fall, and should endeavor to rise above. It should be noted, however, that the minimum core is not static but evolves upwards over time…

The CESCR has emphasized three points in relation to ‘minimum core obligations’:

First, because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster. Second, because poverty is a global phenomenon, core obligations have great relevance to some individuals and communities living in the richest States. Third, after a State

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64 Id. at paras. 10 and 12. Italics added.
65 ICJ 2008, at p. 23.
66 SEPÚLVEDA, p. 366.
party has ensured the core obligations of economic, social and cultural rights, it continues to have obligations to move as expeditiously and effectively as possible towards the full realization of all rights in the Covenant.

Thus, minimum core obligations apply at all times not only to developing states but such obligations even have significance to (economically disadvantaged) individuals and groups in developed states. In this way, they apply universally and establish an ‘international minimum threshold’. The fact that the minimum core content of a right must be realized immediately does not suggest that the remainder of a right sufficiently unimportant to justify inertia or its neglect or denial. Rather, the minimum core should be viewed as a ‘springboard’ for further action by the state. After the state has substantially met its minimum core obligations, it is obliged to realize progressively the remainder of a right.67

In actual practice, some domestic constitutional courts have already accepted and interpreted the ICESCR minimum core obligation in their respective jurisdictions. In its landmark judgment in *Government of South Africa v. Grootboom*, the South African Constitutional Court defined the minimum core obligation as “determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question”, but noted, however, that for purposes of the particular case before it, the Court did not yet have the comparable information at its disposal (income, unemployment, availability of land, poverty, differences between city and rural communities, economic and social circumstances and history of a country) to determine what the minimum core content was of the right to housing as recognized in South Africa.68 The German Constitutional Court, on the other hand, ties the concept of a “minimum level of existence” (Existenzminimum) to the fundamental constitutional duty of the State to “ensure persons the minimum conditions for a dignified existence.”69 Admittedly, these are distinct practices of both the German and South African Constitutional Courts that

68 Government of South Africa v. Grootboom, 2001 (1) SA 46 (CC), paras. 31-32.
69 ICJ 2008, p. 24, citing BVerfGE 40, 121 (133).
have developed according to their own legal traditions and receptivity to international law. Some scholars have observed that “…in general, the direct effect of [ICESCR and similar] treaties is marginal to social and economic rights litigation in the courts examined: courts rarely relied on or even cited international or regional treaty instruments in their written opinions.”\textsuperscript{70}

It may thus appear that the ICESCR minimum core obligation is a constantly evolving, and rather imprecise, conceptual \textit{bricolage}. However, the process of identifying the ICESCR minimum core obligation is not too far removed from the usual methods of proportionality analysis in judicial reasoning.\textsuperscript{71} The CESCR has issued General Comments specifying the minimum core content of the right to food,\textsuperscript{72} the right to health,\textsuperscript{73} the right to social security,\textsuperscript{74} the right to water,\textsuperscript{75} among others.

\textsuperscript{70} VARUN GAURI AND DANIEL M. BRINKS (ED.), COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Cambridge University Press, 2008), at p. 33.

\textsuperscript{71} See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge University Press, 2012), at pp. 202-210 (on proportionality and international and national human rights law); pp. 422-434 (on proportionality and positive constitutional rights).

\textsuperscript{72} CESCR General Comment 12 [The right to adequate food (art. 11)], 1999, para. 17: “Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State Party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.” See also Rolf Künne, The Right to Adequate Food: Violations Related to its Minimum Core Content, pp. 161-183 in AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Intersentia, 2002).

\textsuperscript{73} CESCR General Comment 14 [The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)], para. 43: “…in the Committee’s view, these core obligations include at least the following obligations:
(a) To ensure the right of access to health facilities, goods and services on a discriminatory basis, especially for vulnerable or marginalized groups;
(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
These Comments provide useful guidelines and benchmarks for States not just in their

74 CESC General Comment 19 [The right to social security (art. 9)], 2007, para. 59:
“States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. This requires the State party:
(a) To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies;
(b) To ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for a disadvantaged and marginalized individuals and groups;
(c) To respect existing social security schemes and protect them from unreasonable interference;
(d) To adopt and implement a national social security strategy and plan of action;
(e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;
(f) To monitor the extent of the realization of the right to social security.” See also Lucie Lamarche, The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights, pp. 87-114 in AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Intersentia, 2002).

75 CESC General Comment No. 15 [The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights]), 2002, para. 37:
“…in the Committee’s view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:
(a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
(b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
(c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
(d) To ensure personal security is not threatened when having to physically access water;
(e) To ensure equitable distribution of all available water facilities and services;
(f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.” See also Audrey R. Chapman, Core Obligations Related to the Right to Health, pp. 185-215 in AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Intersentia, 2002).
country reporting duties to the CESCR, but also for undertaking their ongoing and regular national assessments of the “minimum core content” of ICESCR protection.

Certainly, the presence of indeterminacy generates complexity for the process of identifying the ICESCR minimum core obligation at any given point in time.76 Host States confronted with conflicting fiscal priorities between socioeconomic protection and investor compensation during economic emergencies, will inevitably have to establish that prioritization of public funds is indeed for the purpose of maintaining the minimum essential levels mandated by the ICESCR minimum core obligation. But a host State advancing this preliminary argument should not find too much difficulty in satisfying the proof required for the ICESCR minimum core obligation. As shown in the benchmarks and guidelines provided by the CESCR and the comparative domestic jurisprudence interpreting the ICESCR minimum core obligation, it is indeed possible to determine the “essential levels” of each ICESCR right, by referring to the State’s available resources for its disposal at the time of the economic emergency; the nature and needs of vulnerable domestic groups during the economic emergency; the insufficiency of present government efforts to satisfy the ICESCR minimum core obligation and a demonstrable need for more fiscal intervention to directly provide such “essential levels”; and the clear intent of the government to provide for the public interest, and not merely to use the ICESCR core minimum obligation as a subterfuge or pretext to avoid payment of investor compensation. The CESCR General Comments can also provide guidance to States as they make ICESCR-compliant calibrations of socio-economic protections within their jurisdictions.

Finally, it should be emphasized that the minimum floor or obligatory baseline

of socioeconomic protection applies both to times of stability as well as emergency. The absence of a derogation or public emergency provision in the ICESCR that is comparably-worded to ICCPR Article 4(1) does not militate against the applicability of the ICESCR minimum core obligation at all times. ICESCR Article 4 operates to limit ICESCR rights very narrowly: “…in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”77 The Office of the UN High Commissioner of Human Rights holds the view that “[t]here is no express permission under human rights law for States to derogate from their obligations in relation to economic, social and cultural rights during emergencies, disasters or armed conflicts. In fact, in such circumstances, more attention is often required to protect economic, social and cultural rights, in particular those of the most marginalized groups of society.”78 Experts likewise observe that, “…[i]n the words of the CESCR, ‘because core obligations are non-derogable, they continue to exist in situations of conflict, emergency, and natural disaster.’… Given the nature of the rights in the ICESCR, the existence of a general limitations clause in Article 4, and the fact that states are not required to do more than what the maximum available resources permit, derogations from the ICESCR in times of conflict, war, emergency and natural disaster would appear to be unnecessary.”79

77 ICESR Article 4.


Having established that the host State can indeed advance a competing fiscal priority based on its duty to comply with the ICESCR minimum core obligation, **Parts II to IV** will discuss analytical approaches to situate the ICESCR minimum core obligation with the usual investment treaty obligation to compensate investors.

II. **Conflict of Treaties and VCLT Article 30: ICESCR and the Investment Treaty**

During an economic emergency, it is not unlikely that a host State will find itself simultaneously confronted with the duty to comply with the ICESCR minimum core obligation as well as the duty to compensate investors for breaches of substantive guarantees within an investment treaty. This situation could be classified as a treaty conflict, described by Jan Klabbers as “a conflict between provisions of different treaties which cannot be resolved through such mechanisms as ‘reconciling interpretation’ or even ‘balancing’ or ‘proportionality’.”\(^80\) The host State’s dilemma also falls well within Guyora Binder’s definition of a treaty conflict as a situation “when a State concludes a treaty that creates international obligations the performance of which would be inconsistent with the performance of an international obligation to a third State under a previously concluded treaty.”\(^81\)

Significantly, Wilfred Jenks’ 1953 treatise restricts the notion of treaty conflict as one of direct incompatibility between treaties: “A conflict in the strict sense of direct incompatibility arises only where a party to a treaty cannot simultaneously comply with its obligations under both treaties.”\(^82\) It is this same

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concept of \textit{incompatibility} that Jörg Kammerhofer emphasizes to locate norm (and not just treaty) conflicts:

“Most scholars would define norm conflict as a situation where the two norms cannot be observed at the same time:

A conflict between two norms occurs when there is an \textit{incompatibility} between what one ought to do under the first norm and what one ought to do under the second norm, and therefore \textit{obeying} or \textit{applying} one norm necessarily or potentially involves violating the other.

The notion of ‘incompatibility’ is a key element. Sometimes, an analogy is drawn between the logical contradiction of statements and the incompatibility of norms. The latter refers to the factual impossibility of conforming to the prescriptions of all norms, the clearest example of which is where one norm \textit{prohibits} a certain type of behavior and another norm \textit{obligates} the same behavior. Indeed, the possibility is very real that a subject will sometimes be in a situation where it physically cannot behave in conformity with \textit{all} applicable norms.”\textsuperscript{83}

Absent specific language from an investment treaty establishing a host State’s duty to compensate investors for substantive breaches, it is difficult to pit the same against the ICESCR minimum core obligation to draw a situation of direct treaty incompatibility. For purposes of exploring this question, however, I refer to the 1990 Argentina-United Kingdom bilateral investment treaty,\textsuperscript{84} the treaty cited in the \textit{Suez amicus} brief\textsuperscript{85} that first attempted a theory on the relationship between the ICESCR and an investment treaty. As discussed in the \textbf{Introduction}, the \textit{Suez amicus} brief mentioned the existence of a “conflict of norms situation” but did not develop specific analysis on this point for purposes of the case, since the \textit{amicus curiae}


\textsuperscript{85} \textit{Suez amicus curiae} brief, p. 13, para. III.1.
believed that resolving any such conflict was “not necessary for the adjudication of the case… as the contextual interpretation of investment law provides avenues for accommodation and normative dialogue.” 86 Nevertheless, the amicus curiae generally argued that, “in such situation of normative conflict, the primacy of human rights may need to be recognized and given effect.”87

The 1990 Argentina-United Kingdom bilateral investment treaty contains the following provisions on compensation:

“Article 4
Compensation for Losses
Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

Article 5
Expropriation
(1) Investments of investors of either Contracting Party shall not be nationalized, expropriated, or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as ‘expropriation’) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate, and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.”88

86 Suez amicus curiae brief, p. 26, para. IV.1.
87 Id.
88 Argentina-UK BIT, Articles 4 and 5(1). Italics added.
As seen in the foregoing provisions of the Argentina-UK BIT, the treaty obligation to provide compensation for investors extends to both cases of direct and indirect expropriations (e.g. government regulatory measures that have the effect of expropriation are otherwise known as “creeping” expropriations). Investor compensation has to be immediate (“shall be made without delay”); equivalent to its closest approximation of “genuine value” (“immediately before the expropriation or before the expropriation became public knowledge”); and should be no less favourable than the compensation accorded to the host State’s domestic investors or the investors from a third State for losses incurred during a state of national emergency in the host State.

It is clear that there would be a situation of incompatibility or direct treaty conflict between the host State’s duty to compensate investors, with the same State’s duty to observe the ICESCR minimum core obligation even in times of economic emergencies. Given a finite pool of public funds available to meet the host State’s obligations during an economic emergency, a situation could foreseeably arise where, due to the gravity of the economic emergency in the host State, the latter has to completely allocate all available public funds exclusively to providing the minimum essential levels required under the ICESCR minimum core obligation, leaving nothing for the compensation immediately due to investors injured by the host State’s direct or indirect expropriatory measures.

The Suez case provides a crystal example of this tension. The amicus curiae in

Suez alleged that during the 2001-2002 Argentine economic crisis, “a sudden three-fold spike in the price of water to 7,740,000 inhabitants and of sewage services to 5,890,000 inhabitants could have had devastating consequences. It would have transformed an economic and social crisis into a full-fledged humanitarian disaster by abruptly depriving millions of citizens of their access to life-giving water.”90 While this was admittedly not a case of direct provisioning of public funds as Argentina did not directly subsidize water prices, but rather sought to renegotiate existing water concessions with foreign investors, subsequently freezing the tariffs owed to investors under their concession agreements, and ultimately, terminating the concession agreements,91 it was a situation where the use of public funds to satisfy the ICESCR minimum core obligation to ensure the population’s continued access to essential levels of water could have been argued against the investors’ rights to compensation.

On the particular facts of Suez, however, the arbitral tribunal declared that Argentina had denied fair and equitable treatment (FET) to the Claimants’ investments, and deferred the decision on damages arising from such denial of fair and equitable treatment.92 Significantly, the arbitral tribunal did not find that Argentina had directly or indirectly expropriated the Claimants’ investments – which would have triggered the duty to compensate under Article 5(1) of the Argentina-UK BIT. As there was no counterpart provision for compensation in case of breach of the standard of fair and equitable treatment under Article 2(2) of the Argentina-UK BIT,93 it could be

90 Suez amicus curiae brief, p. 3, para. I.2.


92 Id. at para. 276.

93 Argentina-UK BIT, Art. 2(2) provides: “(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of
expected that the arbitral tribunal’s decision on damages would be based on the general rules of reparations under the law of international responsibility,\textsuperscript{94} and not from a BIT-defined obligation to compensate.

The host State may thus find itself with a duty to compensate investors, which can arise from different sources of international law. In the particular case of the Argentina-UK BIT, a breach of the provisions on expropriation gives rise to a duty to provide compensation as defined in the BIT. However, the breach of the FET standard gives rise to a separate duty to provide for reparations (which may or may not take the form of monetary compensation) defined under general international law.

For purposes of developing a thorough analysis of the conflict situation in this case between the host State’s duty to compensate and duty to observe the ICESCR minimum core obligation, I differentiate the analysis according to the source of the duty to compensate. In the first subsection, I deal with a treaty obligation to compensate investors (primarily based on the language used in Articles 4 and 5(1) of the Argentina-UK BIT) in relation to the ICESCR minimum core obligation, and show that this situation of pure treaty conflict is governed by Article 30 of the Vienna Convention on the Law of Treaties (VCLT). The second subsection will examine the normative conflict between the host State’s customary duty to provide reparations (based on the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts) and the ICESCR minimum core obligation.

A. BIT obligation to compensate vis-à-vis ICESCR minimum core obligation

Assuming that the host State’s investment treaty duty to compensate investors is similarly worded as Article 5(1) of the Argentina-UK BIT, it should be recalled that the compensation would have to be paid “without delay”. Assume further that during a particular economic emergency, the host State does not have the resources to pay both the investor compensation due under the BIT, as well as to provide for the “essential levels” of socioeconomic protection required under the ICESCR minimum core obligation, the result is a clear situation of treaty incompatibility or conflict. Fully utilizing the available State resources to meet the ICESCR minimum core obligation would result in non-payment of the investor compensation that is immediately due, and conversely, payment of the investor compensation would lead to the State’s inability to provide the essential levels required under the ICESCR minimum core obligation. (While one can freely admit that the complex dynamics of fiscal prioritization and budget management is not a matter of binary or zero-sum choices such as these, I adopt these assumptions simply to draw a clear exposition on the applicability of VCLT Article 30 to this treaty conflict.)

1. ICESCR as alleged jus cogens: Inapplicable Rule, Problematic Result

Before proceeding to the application of VCLT Article 30, however, it is necessary to deal with the question of “treaty hierarchy” that could justify the prioritization of the ICESCR minimum core obligation to the exclusion of the investment treaty obligation to compensate investors. To recall, the Suez amicus curiae brief made the intuitively appealing assertion that human rights treaties “could

95 Indeed, the history of government spending and other regulatory measures during economic emergencies affirms that fiscal decisions are anything but zero-sum. See CARMEN M. REINHART AND KENNETH S. ROGOFF, THE TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (Princeton University Press, 2009).
displace investment law in a conflict of norms situation”. 96 The brief argued the primacy of human rights law, as a matter of *jus cogens* that should be given supremacy over investment obligations. 97

There are two difficulties with this argument. First, it assumes that the entire corpus of human rights law – including the ICESCR – bears the status of *jus cogens*, or peremptory norms defined in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) as norms that are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” 98 Under the law of international responsibility, a State cannot avail of any of the circumstances precluding wrongfulness for breaches of peremptory norms of general international law. 99 The International Law Commission (ILC) stresses that “[t]he criteria for identifying peremptory norms of international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized by the international community of States as a whole…[t]hose peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.” 100 Nowhere in this enumeration is the ICESCR indicated. The

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97 Id. at p. 27.

98 VCLT Article 53.


100 Ibid. at p. 85, para. 5.
disparate record of States’ ratifications, reservations, and modes of accession to the ICESCR further contradict its alleged *jus cogens* status.\(^{101}\) To date, international legal scholarship has not achieved a consensus on the processes of identification of *jus cogens* norms, albeit the literature on the subject is vast.\(^{102}\)

Owing to the International Court of Justice’s circumspection and reticence, the legal category of *jus cogens* norms remains quite undeveloped in international law.\(^{103}\) While the Court has categorically characterized the prohibition against genocide as a *jus cogens* rule in its 2006 Judgment on Jurisdiction and Admissibility in *Armed Activities on the Territory of the Congo*,\(^{104}\) it has chosen not to elucidate any further example of *jus cogens* rules beyond this case. In its 1995 Advisory Opinion

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\(^{103}\) See Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 Eur. J. Int’l L. 3 (2008), pp. 491-508, at pp. 501-502 (“Even in cases in which treatment of or reference to *jus cogens* would have been compelling, the ICJ has carefully eschewed doing so…The fact that the ICJ was never fond of *jus cogens* – admittedly not a legal character of its own creation – is further attested by the Court’s alternative use of the notion of obligations *erga omnes*.“)

\(^{104}\) *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, at pp. 31-32, para. 64 (”The Court will begin by reaffirming that ‘the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’ and that a consequence of that conception is ‘the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’...[i]t follows that ‘the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*’...The Court observes, however, as it has already had occasion to emphasize, that ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things’. ...and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for jurisdiction of the Court to entertain that dispute. Under the Court’s Statute, that jurisdiction is always based on the consent of the parties.” (Italics added.)
on the *Legality of the Threat or Use of Nuclear Weapons*, the Court refused to
determine if principles and rules of international humanitarian law were examples of
*jus cogens*: “[t]he question whether a norm is part of the *jus cogens* relates to the
legal character of the norm. The request addressed to the Court by the General
Assembly raises the applicability of the principles and rules of humanitarian law in
cases of recourse to nuclear weapons and the consequences of that applicability for
the legality of recourse to these weapons. But it does not raise the question of the
caracter of the humanitarian law which would apply to the use of nuclear weapons.
There is, therefore, no need for the Court to pronounce on this matter.”

Rather, the Court has preferred to adopt the language of “obligations *erga
omnes*” (or obligations owed to the international community as a whole). In the
famous *obiter dictum* in the *Barcelona Traction* case, the Court did not refer to *jus
cogens* norms but rather “obligations *erga omnes*”, specifying as examples the
obligations deriving in contemporary international law such as “the outlawing of acts
of aggression, and of genocide, as also from the principles and rules concerning the
basic rights of the human person, including protection from slavery and racial
discrimination. Some of the corresponding rights of protection have entered into the
body of general international law (*Reservations to the Convention on the Prevention
23*); others are conferred by international instruments of a universal or quasi-universal
caracter.” Likewise in its *Israeli Wall* Advisory Opinion in 2004, the Court


echoed its earlier view in its 1995 Judgment in the *East Timor* case,\textsuperscript{107} where it expressly characterized the right to self-determination as a “right erga omnes”, again without referring to it as a rule of *jus cogens*.\textsuperscript{108} In its February 2012 Judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, the Court rejected the existence of a supposed conflict between the *jus cogens* rules that Italy asserted were violated by Germany from 1943-1945 (e.g. deportation of prisoners of war and civilians to forced or slave labour, murder of civilians in occupied territories) and the rule of State immunity asserted by Germany. The Court was careful not to specifically enumerate *jus cogens* norms in this case, instead preferring to reiterate the definition of a *jus cogens* rule as “one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application…the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected.”\textsuperscript{109} In light of this sparse practice on *jus cogens* and the near-silence of international decisions on the alleged *jus cogens* nature of the ICESCR, it is unsurprising that the attempt to cast the ICESCR as *jus cogens* has been viewed as more of a social “movement” or rights advocacy: “…while not all human rights may have achieved recognition as *jus

\textsuperscript{107} *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29 (“In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable.”)

\textsuperscript{108} *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 88.

\textsuperscript{109} *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, *I.C.J. Reports 2012*, at paras. 95 and 97. Italics added.
cogens, there is growing pressure to see all basic human rights (such as those in the ICCPR and ICESCR) as *jus cogens.*"\(^{110}\)

The second difficulty with the argument of ICESCR supremacy as alleged *jus cogens* lies with how VCLT Article 53 would attach the effect of *treaty invalidity* if the supposed conflict with *jus cogens* existed at the time the investment treaty was concluded. VCLT Article 53 is explicit: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”\(^{111}\)

Even assuming that a host State successfully proves that the ICESCR is indeed *jus cogens,* and is able to show that the investment treaty was concluded despite the conflict with the ICESCR, the effect would not be simply one of normative hierarchy (as is found in Article 103 of the United Nations Charter\(^{112}\)), or the ICESCR’s displacement of the investment treaty as the applicable law. VCLT Article 53, if applied according to its terms, could result in voiding the entire investment treaty outright.

These effects unleash a new set of problems for the host State. For one, the conflict between the ICESCR minimum core obligation and the investment treaty

\(^{110}\)Curtis Francis Doebbler, *International Human Rights Law: Cases and Materials* (2004), at p. 94. See also Koji Teraya, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights,* 12 Eur. J. Int’l L. 5 (2001) pp. 917-941, at pp. 929-930 (“…not all human rights can obtain *jus cogens* status, as some human rights remain controversial as a result of cultural diversity. Respect for this multicultural aspect requires a higher threshold for ‘intervention’ by the international community in the form of invalidation. Thus, only basic rights are in a certain sense *jus cogens.*”), Benedetto Conforti, *Consistency among Treaty Obligations,* pp. 187-191 in Enzo Cannizzaro (Ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), at p. 189 (“…Apart from Article 103 [UN Charter] there do not seem to be any other cases where the obligations of one treaty have to prevail over later ones. In my opinion, primacy cannot be accorded to some multilateral treaties of great importance, such as, for example, those on human rights or those which are concluded in the context of the World Trade Organization, since there is no significant practice on the matter. Of course, if a multilateral treaty contains rules which reproduce norms of *jus cogens,* such norms will take priority…”).

\(^{111}\)VCLT Article 53.

\(^{112}\)Article 103 of the UN Charter specifically provides for a situation of Charter supremacy over other treaty obligations: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”
duty to compensate investors is one that arises long after the investment treaty had been concluded, and is, in fact, already being applied. In order to gain the benefit of VCLT Article 53, the host State would have to show that the conflict with the ICESCR (as supposed jus cogens rules) already existed from the terms of the investment treaty at the time of its conclusion. VCLT Article 53 applies “if the treaty which is being concluded cannot – not even by employing all means of interpretation in Articles 31 and 32 – be performed in the future without breaching jus cogens. In such a case, the treaty will automatically be void, i.e. it will have no legal force. The treaty’s invalidity applies ab initio, as from its conclusion.”

Moreover, the invalidity ab initio of the investment treaty would arguably make it incumbent upon the host State to return all benefits illegally obtained from the (supposedly) void treaty. VCLT Article 71 imposes a duty upon all States parties to a treaty deemed void for conflicting with jus cogens to “eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law”, as well as to “bring their mutual relations into conformity with the peremptory norm of general international law.” At best, the host State would not be permitted to unjustly enrich itself by knowingly entering into a treaty that would conflict with jus cogens (in this case, the ICESCR as argued), and retaining the benefits of a treaty that is void ab initio. Instead of exonerating itself from the duty to compensate investors during an economic emergency by invoking the alleged jus cogens nature of the ICESCR, the


114 VCLT Article 71.

115 See Christoph Schreuer, Unjustified Enrichment in International Law, 22 Am. J. Comp. L. 295 (1974), at pp. 295-296 (“Restitution was also granted in situations where transfers of assets took place under putative agreements which later turned out never to have been validly concluded.”)
host State finds itself in the even worse situation of being internationally obligated to return the actual principal of the investment itself back to the investors as a result of the supposed invalidity ab initio of the investment treaty. Plainly, this is a proverbial case of throwing the baby out with the bathwater (Das kindt mit dem bad vB schitten).116 As I show in the next subsection, the ICESCR minimum core obligation can be substantively argued without causing the invalidity of the investment treaty.

2. Applying VCLT Article 30: Differentiated Results

As shown in the previous section, arguing the alleged jus cogens nature of the ICESCR causes numerous problems for the host State. Not only would the host State be burdened to prove that the ICESCR belongs to the elusive normative category of jus cogens, but doing so would altogether undermine the stream of benefits that the host State receives from an investment treaty. Instead of gaining temporary relief from duties to investors during an economic emergency, the host State would lose investors altogether through the invalidation of the investment treaty, as a result of the application of VCLT Article 53 and the alleged jus cogens nature of the ICESCR.

For purposes of achieving the host State’s objective, I submit that the due application of VCLT Article 30, can, in some measure assist the host State with the question of incompatibility between the ICESCR minimum core obligation and the investment treaty obligation to compensate investors. VCLT Article 30 provides the rule on “Application of successive treaties relating to the same subject-matter”:

“Article 30

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of State parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 [Termination or suspension of the operation of a treaty implied by the conclusion of a later treaty], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:
   (a) as between States parties to both treaties the same rule applies as in paragraph 3;
   (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to Article 41 [Agreements to modify multilateral treaties between certain of the parties only], or to any question of termination or suspension of the operation of a treaty under Article 60 [Termination or suspension of the operation of a treaty as a consequence of its breach] or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.”

It is immaterial that the title of VCLT Article 30 refers to treaties of the “same subject-matter”, as long as the incompatibility conceptually arises from the treaties that are subject of the comparison. The International Law Commission (ILC) held that while the above rules in VCLT Article 30 “were [initially] formulated in terms of the priority of application of treaties having incompatible provisions”, ultimately the ILC held that “although the rules may have particular importance in cases of

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117 VCLT Article 30. Italics and bracketed insertions added.

118 Alexander Orakhelashvili, Article 30 Application of successive treaties relating to the same subject-matter, pp. 764-800, at p. 776 in Olivier Corten and Pierre Klein (Eds.), The Vienna Convention on the Law of Treaties: A Commentary, Vol. I (Oxford University Press, 2011). ("...treaties can supplement each other by relating to the same subject matter (e.g. the case of optional protocols), and whether they are in conflict depends on their actual terms. According to Vierdag, the requirement of the sameness of the subject matter under Article 30 is satisfied if an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results.") [hereafter, “CORTEN AND KLEIN”].
incompatibility, they should be stated more generally in terms of the application of successive treaties relating to the same subject-matter.” 119 The ILC Special Rapporteurs on the Law of Treaties – Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock – likewise used the perspective of incompatibility to deal with treaty conflicts, albeit each had their respective prescriptions for resolving incompatibility. 120 Benedetto Conforti recently observed that the alleged ambiguity of treaties having “the same subject matter” is “mere pedantry since it is evident that if Article 30 is to be interpreted according to common sense, conflict only arises when the behavior required by a rule of one entails the violation of a rule of the other.” 121 There should thus be no ratione materiae obstacle to the application of VCLT Article 30 to the conflict between the ICESCR minimum core obligation and the investment treaty duty to compensate investors.

Assuming that the ICESCR is the earlier treaty, and not all the parties to the ICESCR are parties to the investment treaty (as the later treaty), the applicable rule would thus be VCLT Article 30(4). This provision has two aspects. First, as between


120 See I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (Manchester University Press, 1973), at pp. 62-64. (“…Lauterpacht, in his ‘First Report on the Law of Treaties’, suggested the general rule that a treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more contracting parties. Fitzmaurice took a position closer to that outlined by McNair. Where a treaty between State A and C was inconsistent with an earlier treaty between States A and B, the second treaty was not to be invalid, but State A might incur responsibility to either State B or State C for failure to perform its treaty obligations. The later treaty would be invalid only when (a) the earlier treaty had expressly prohibited the conclusion of a later inconsistent treaty or (b) the later treaty necessarily involved a direct breach of the earlier treaty. Waldock reviewed de novo the proposals of the previous Special Rapporteurs and recommended that the approach based on the invalidity of a later, inconsistent treaty be dropped…He was rather of the view that the issue should be approached, not from the point of view of the validity or invalidity of the later treaty, but from that of the priority of incompatible treaty obligations. The Convention regime on successive treaties…is based largely on Waldock’s proposals…” (Italics in the original.)

States parties to both the ICESCR and the investment treaty, VCLT Article 30(4)(a) provides that the same rule applies as in VCLT Article 30(3): “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.” There can be no effect of termination or suspension of the ICESCR under VCLT Article 59, because not all parties to the ICESCR (as the earlier treaty) are parties to the investment treaty. Applying VCLT Article 30(4)(a) in relation to VCLT Article 30(3), therefore, the ICESCR, as the earlier treaty, thus applies to the extent that its provisions are compatible with the investment treaty, as the later treaty. This treaty conflict rule thus begs the question of the extent of ICESCR compatibility with the investment treaty. Insofar as the narrow question of the host State’s simultaneous ICESCR minimum core obligation and the investment treaty duty to provide compensation, VCLT Article 30(4) would affirm that the ICESCR indeed applies to the extent it is compatible with the investment treaty as the later treaty. Allocating funds for the continued observance of the ICESCR minimum core obligation is permitted, so long as this conduct remains compatible with the investment treaty duty to compensate.

A possible way to show this compatibility between the ICESCR minimum core obligation and the investment treaty duty to compensate would be for the host State to recognize both obligations, but negotiate with the counterpart State (the State of the nationality of the investor) on the timing, mode, and form of payment of compensation owed to such investors for the host State’s expropriation of their investment. Another way would be to recognize both obligations, but to differentiate

122 VCLT Article 30(3).
the public funds to be provided for maintenance of the ICESCR minimum core obligation as funds that are not freely disposable (or not subject to an investor lien) for the compensation owed under the investment treaty. The host State may choose to satisfy its obligation to compensate for expropriatory acts through the issuance of sovereign debt instruments, consistent with its fiscal powers, or possibly through the recognition of an investor lien on government assets. The host State owes the obligation to its counterpart State in the investment treaty to apply the treaty obligation to compensate investors, and so long as this obligation is recognized and performed in good faith (pacta sunt servanda) to the extent defined and required by the tenor of the obligation, the host State may arguably be said to have observed VCLT Article 30(4)(a), without either the ICESCR or the investment treaty becoming invalid as a result of the treaty conflict.

However, it may well be the case that the host State does not have the resources to perform both the ICESCR minimum core obligation and the investment treaty duty to compensate at a certain point in time during the economic emergency. In this case, the host State must be advised that while the applicable obligation under VCLT Article 30(4)(a) would appear to be the investment treaty

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124 VCLT Article 26.

125 This further assumes that traditional sources of sovereign external financing from international financial institutions and regional development banks are not available or immediately accessible to meet the host State’s fiscal needs for both the ICESCR provisioning and investor compensation. The World Bank particularly noted the heavier external financing needs of developing countries during the 2008/2009 global financial crisis. See WORLD BANK, GLOBAL DEVELOPMENT FINANCE: CHARTING A GLOBAL RECOVERY (World Bank Publications, 2009), at p. 81.
obligation to pay compensation, under VCLT Article 30(5), this treaty choice is without prejudice to the question of the host State’s responsibility for materially breaching ICESCR by failing to observe the ICESCR minimum core obligation. VCLT Article 30(4) applies the lex posterior derogat legi priori rule to States who are parties to both treaties: “States entering into a new agreement are presumed to intend that its provisions shall apply, rather than those of any earlier agreement between them regarding the same matter.”126 The ILC explained that the rules in VCLT Article 30(4) “determine the mutual rights and obligations of the particular parties in each situation merely as between themselves. They do not relieve any party to a treaty of any international responsibilities it may incur by concluding or by applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty. If the conclusion or application of the treaty constitutes an infringement of the rights of parties to another treaty, all the normal consequences of the breach of a treaty follow with respect to that other treaty.”127 A host State that chooses to purposely breach the ICESCR minimum core obligation thus cannot escape international responsibility by arguing that VCLT Article 30(4) led it to apply the investment treaty obligation.

Second, as between a State party to both treaties and a State party to only one of the treaties, VCLT Article 30(4)(b) would affirm that when it is only the host State who is a party to both the ICESCR and the investment treaty obligation, the investment treaty – as the “treaty to which both States are parties” under VCLT Article 30(4)(b) – will govern the mutual rights and obligations of the host State and the counterpart State in the investment treaty. This rule codifies the rule pacta tertiis

126 VILLIGER, at p. 406.
127 ILC COMMENTARY TO THE VCLT, p. 217, para. 11. Italics in the original.
nec nocent nec prosunt (e.g. “a party to a treaty cannot be affected by any agreement which other parties of the treaty conclude with other States”). 128 If the other State party to the investment treaty is not a party to the ICESCR, the host State has to apply the investment treaty as against that State party, notwithstanding its subsisting obligations under the ICESCR. In any event, VCLT Article 30(5) likewise preserves the question of the host State’s international responsibility for any potential breaches of the ICESCR.

The analysis should be reversed if the investment treaty is the “earlier” treaty, and the ICESCR, the “later” treaty. In this situation, as between States Parties to both the investment treaty and the ICESCR, if the investment treaty is not deemed terminated or suspended under VCLT Article 59, then it applies only to the extent that the investment treaty’s provisions are compatible with the ICESCR. The host State can apply the ICESCR as preferred treaty under VCLT Article 30(4), without prejudice, under VCLT Article 30(5), to any question of international responsibility (if any) under the BIT for entering into a subsequent treaty whose obligations are incompatible to that owed to the other State Party in the BIT.

Applying VCLT Article 30 certainly does not provide a host State with the perfect legal solution, but at the very least it does help clarify policy options for the host State when confronted with this kind of treaty conflict between the ICESCR minimum core obligation and the investment treaty obligation to pay compensation. VCLT Article 30 shows that neither treaty would be invalidated. 129 It also shows that

128 VILLIGER, at p. 407.

129 An arbitral tribunal has already had occasion to differentiate the consequences between VCLT Article 59 and VCLT Article 30. See Eureko BV v. Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, 26 October 2010, paras. 240-241:

“240. Article 59 is concerned only with the termination of the entire treaty. Article 30, in contrast, is concerned with the priority between particular provisions of earlier and later treaties relating to the same subject-matter. While Article 30 is, therefore, focused on particular provisions, the question
the choice of treaties in a conflict of treaties situation does not fall within a hard binary. While VCLT Article 30(4) tries to closely approximate respect for the will of the States parties entering into both the earlier and the later treaty, its purely temporal orientation does not lead to an unsanctioned and exclusive choice of treaty.

Indeed, all that VCLT Article 30 does, according to Alexander Orakhelashvili, is to “lay down rules of thumb, or reference rules, working out some legal consequences while leaving others to more specific arrangements of conventional law. Article 30 deals both with cases potentially involving the illegality of treaties (para. 4b) and those which relate to a perfectly lawful derogation from other treaty obligations, unless some problems arise in terms of the indivisible object of one of the treaties involved (paras. 1-4 and 4a). Hence, the rules of Article 30 are essentially neutral conflict, or reference, rules.”\textsuperscript{130} It was with this view in mind that he was skeptical of VCLT Article 30(4)’s application “where one of the treaties is of a humanitarian character and embodies integral obligations…Article 30(4) cannot resolve such controversies on substantive terms…but ultimately, due to the combined relevance of Article 30(4) and (5), some reciprocal settlement, or even the collective reciprocal termination of such treaties, can be envisaged.”\textsuperscript{131} As a rule of thumb, VCLT Article 30 sidesteps the issue of subject matter – it does not contain a

under Article 59 is whether the entire treaty should be terminated by reason of the adoption of a later treaty relating to the same subject-matter. The very fact that these situations are treated separately in the VCLT points to the need under Article 59 for a broader overlap between the earlier and later treaties than would be needed to trigger the application of Article 30.

241. This conclusion is borne out by a comparison of the terms of Article 30 and Article 59. Under Article 30 the test is whether the two successive treaty provisions are “compatible”. Under Article 59 the test is whether the provisions of the later treaty are “so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.” Article 30 may be triggered by the slightest incompatibility between the provisions of the earlier and later treaties. Article 59 clearly requires a broader incompatibility between the two treaties.”

\textsuperscript{130} Alexander Orakhelashvili, \textit{Article 30 Convention of 1969}, pp. 764-800, at p. 773, para. 21 in \textsc{Corten and Klein}.

\textsuperscript{131} Id. at p. 793, para. 76 in \textsc{Corten and Klein}. 
restatement of the \textit{lex specialis derogat legi generali} rule ("special law prevails over the general law").\footnote{VILLIGER, at p. 409.} \footnote{Id. at para. 3, p. 409.} It is for this reason that it could apply to conflicts between multilateral human rights treaties and bilateral treaty relationships such as those found in BITs. As Mark Villiger observed, “since Article 30 is formulated in a general manner and does not distinguish between particular treaties, it appears difficult to argue that it does not cover certain types of treaties (e.g. human rights treaties)…”\footnote{“Compensation” in this sense has been referred to in investment arbitral awards alternatively or interchangeably as “damages”. However, monetary damages comprise only one form of compensation. \textit{See IRMGGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW} (Oxford University Press, 2009), at p. 12 [hereafter, “MARBOE”]: "Compensation in general use has a broader meaning than ‘damages’. Very broadly, it may encompass the payment of a sum of money in order to balance any kind of disadvantage, be it material or immaterial damage, and without any reference to a specific legal obligation behind it. It is sometimes even left open on purpose, if there is a legal obligation to pay at all. Furthermore, the term ‘compensation’ is also used to denote the extent of liability for damage caused by lawful acts. The concept of ‘compensation’ appears to be more ‘neutral’ in comparison to the concept of ‘damages’ which is usually connected to the allegation of a violation of legal obligations."} At best, therefore, the host State should be aware of the differentiated consequences arising from the obligation it ultimately chooses to observe during an economic emergency.

\textbf{B. Obligation to provide compensation under general international law vis-à-vis the ICESCR minimum core obligation}

The duty to compensate investors may also arise from general international law,\footnote{“Compensation” in this sense has been referred to in investment arbitral awards alternatively or interchangeably as “damages”. However, monetary damages comprise only one form of compensation. \textit{See IRMGGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW} (Oxford University Press, 2009), at p. 12 [hereafter, “MARBOE”]: "Compensation in general use has a broader meaning than ‘damages’. Very broadly, it may encompass the payment of a sum of money in order to balance any kind of disadvantage, be it material or immaterial damage, and without any reference to a specific legal obligation behind it. It is sometimes even left open on purpose, if there is a legal obligation to pay at all. Furthermore, the term ‘compensation’ is also used to denote the extent of liability for damage caused by lawful acts. The concept of ‘compensation’ appears to be more ‘neutral’ in comparison to the concept of ‘damages’ which is usually connected to the allegation of a violation of legal obligations.”} such as for the host State’s breach of other substantive guarantees of an investment treaty which do not expressly provide for terms of compensation, such as the fair and equitable treatment (FET) standard, full protection and security standard, non-discrimination clause, national treatment clause, and most favoured nation (MFN) clauses. Among the arbitral awards that held Argentina internationally responsible for the measures it implemented during its 2001-2002 financial crisis, the
awards in *El Paso, LG & E, Impregilo, Sempra, Azurix, Enron, CMS, BG Group, Suez*, and *Total* held that Argentina breached the FET standard in the respective BITs at issue in each case, and determined the compensation owed by Argentina under the general law of international responsibility. The same awards rejected the claims against Argentina for alleged violation of the direct or indirect expropriation provisions in an investment treaty, which usually contained an explicit clause on prompt, adequate, and effective compensation.\(^{135}\) The award in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA* found that Argentina violated the FET standard, full protection and security standard, and the BIT provision on expropriation, and thus applied methods of compensation arising from both general international law (for breaches of FET and full protection and security) and the BIT (for violation of the expropriation provision).\(^{136}\) While all of these arbitral awards generally referred to compensation as a form of reparations permissible within the *Chorzów* standard,\(^{137}\) there is no precise unanimity among these awards insofar as the

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\(^{136}\) *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, Award, ICSID Case No. ARB/97/3, 20 August 2007, para. 11 and 11.1.

\(^{137}\) *Factory at Chorzów* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26), at p. 47:

“The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by
method for determining the quantum of compensation is concerned. It is necessary to examine the divergence in the methods of quantifying compensation, as this will suggest potentially acceptable ways to situate the ICESCR minimum core obligation as a vital adjustment factor in the process of quantification.

1. Assessing compensation for breaches of BIT standards that do not specify compensation: the Argentine cases

The investment arbitration jurisprudence involving Argentina’s measures during its 2001/2002 financial crisis demonstrates some telling flexibility over the process of determining compensation as “damages” for breaches of treaty standards such as FET, national treatment, non-discrimination, among others. In the 2011 Award in *El Paso Energy International Company v. Argentina*, the arbitral tribunal concurred with the tribunal’s view in *SD Myers v. Canada* that “the silence of the treaty indicates the intention of the drafters ‘to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case’, adding that ‘whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation.” The *El Paso* tribunal applied the “fair market value” standard to determine the value of the loss suffered by the claimant investor, adopting the definition set by the American Society of Appraisers’ International Glossary of Business Valuation Terms: “the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical

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138 Id. at note 137, paras. 698-742.


140 Id. at note 137, para. 701.
willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”

Arbitrator Brigitte Stern took the position that a fair market value assessment “should only take into account what a willing buyer and a willing seller could foresee at the time of the interference with the investor’s rights”, but the majority of the El Paso tribunal stressed that the Chorzów standard includes “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which values is designed to take the place of restitution which has become impossible.”

The El Paso tribunal adopted the DCF (discounted cash flow) method of valuation, as the standard preferred in the Expert’s Reports to the tribunal, and also as the method chosen by other arbitral tribunals in similar cases against Argentine measures in CMS, Enron, and Sempra. Significantly, the Tribunal found that the “withholding tax” (a tax imposed by Argentina on the export of crude oil and liquefied petroleum gas in 2002) amounted to a tax measure that should be exempt from the base amounts of financially assessable damages under Article XII(2) of the BIT. This exclusion in favor of the State’s sovereign power of taxation demonstrated the tribunal’s deference to, and recognition of, the State’s fundamental sovereign powers and duties to raise public revenue.

The Impregilo award in 2011 likewise began its analysis of compensation with a restatement of Chorzów standard, stressing that “Impregilo should in principle

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141 Id. at note 137, paras. 702-703.
142 Id. at note 137, at para. 705.
143 Id. at note 137, at paras. 711-712.
144 Id. at note 137, paras. 726-732.
be placed in the same position as it would have been, had Argentina’s unfair and inequitable treatment of Impregilo’s investment not occurred.”

This was in no way a precise or definitive process – as the tribunal acknowledged, “it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo. Instead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation.” The tribunal then conducted a fact-intensive analysis, concluding ultimately that the failure of the concession (the investment subject of this case) were attributable in part to the claimant as well as to the acts or failures of Argentina in implementing measures during its 2001/2002 economic crisis. Due to the “shared responsibility for the failure of the concession”, the tribunal deemed it “inappropriate to calculate damages on the basis of customary economic parameters such as a cost or asset based method or an income method. Instead, the damages to be paid by the Argentine Republic to compensate for unfair and inequitable treatment should be determined on the basis of a reasonable estimate of the loss that may have been caused to Impregilo.”

The tribunal determined that the compensation to be awarded should be based only on the capital contribution of Impregilo, and not for any potential gains from the concession, since “Impregilo has not shown that the concession was likely to have been profitable, if there had been no interference by the Argentine legislator and the Argentine public authorities.”

The 2007 *Sempra* award proceeded somewhat differently in its assessment of compensation after establishing the *Chorzów* standard. The *Sempra* tribunal first

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146 Id. at note 147, at para. 371.

147 Id. at note 147, para. 376-378.

148 Id. at note 147, paras. 379-381.
clarified that “[i]n the absence of restitution or agreed renegotiation of contracts or other measures of redress, the appropriate standard under international law is compensation for the losses suffered by the affected party.”149 By no means was financially assessable damage or compensation the defualt form of reparations – if the host State and the claimant could proffer and agree upon other modes of redress consistent with restoring the claimant to the situation it was in but for the international breach, then compensation would be unnecessary.

Notwithstanding this clarification, however, the Sempra tribunal nevertheless still relied on the BIT definition of compensation (based on fair market value) for expropriation, and justified this approach by maintaining that “several awards of awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases, it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same.”150 The tribunal then proceeded to use the same definition of fair market value issued by the American Society of Appraisers in its International Glossary of Business Valuation Terms,151 and relied on a method of arriving at the damages by “first stating the value of the firms under the but for scenario [value of the firms in the context where the spirit of the original contractual conditions would have been maintained for the duration of the License agreement], from which the value under the pesification scenario [the

149 Sempra Energy International v. Argentina, Award, ICSID Case No. ARB/02/16, 18 September 2007, at para. 400.

150 Id. at note 151, para. 403.

151 Id. at note 151, para. 405.
Argentine response to the economic crisis] is subtracted and the value of the historical damages is added."^{152}

The 2006 Azurix award dealt with the investor’s claim for “enhanced compensation” (which was well beyond the BIT provision defining compensation for expropriation), due to alleged cumulative breaches of other provisions of the BIT.^{153} Adopting the positions taken by the tribunal in CMS v. Argentina, and the NAFTA tribunals in the S.D. Myers, Pope & Talbot, and Feldman cases, the Azurix tribunal held that it was “appropriate” to use compensation based on the fair market value of the concession (investment) due to cumulative breaches in the case beyond the creeping or indirect expropriation subject of specific BIT provision.^{154} The tribunal thereafter adopted “actual investment” (and not standard “book value”) as the valuation methodology.^{155} Applying this method, the ultimate compensation awarded by the Azurix tribunal only included the concession price, additional capital contributions for the concession, and actual litigation costs, rejecting Azurix’s claims for consequential damages, as well as its theory of restitution for “unjust enrichment”.^{156}

Similarly, the 2007 Enron award had little difficulty adopting the standard of compensation for non-expropriation breaches of the BIT. The Enron tribunal adopted the same definition of compensation (‘fair market value’) provided in the BIT for expropriation, observing that “the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and those circumstances the

^{152} Id. at note 151, paras. 412 and 415.

^{153} Azurix Corporation v. Argentina, Award, ICSID Case No. ARB/01/12, 23 June 2006, para. 409.

^{154} Id. at note 155, paras. 419-424.

^{155} Id. at note 155, para. 425.

^{156} Id. at note 155, paras. 432-437.
standard of compensation can also be similar on one of the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.” 157 The tribunal rejected Argentina’s argument that the claimant had received historically higher returns on its investment, as “[n]either historic nor estimated returns have been retained as a valid ground to oppose compensation under international law.” 158 To ascertain the level of damages sufficient to “undo the material harm” caused by the Argentine pesification and other measures taken during the financial crisis, the Enron tribunal compared “the value of the claimants’ investment before the measures were adopted and its value at present”, applying the fair market value definition and discounted cash flow (DCF) valuation method (albeit with adjusted assumptions given the facts of the case and the degree of uncertainty common to the DCF method159), also rejecting the book


158 Id. at note 159, para. 370.

159 Id. at note 159, paras. 388-389:

“388. LECG [the expert] uses DCF for establishing both the value before the measures were taken and the current value of the claimants’ participation in that business, the difference between one and the other being the estimated losses, subject to some adjustments. While the Tribunal finds nothing wrong in that approach, which is commonly used and has been applied by other tribunals, it involves some degree of uncertainty in the assumptions taken into account. Because there are in this case specific transactions concerning the claimants’ participation in TGS, the Tribunal considers that the real value obtained in these transactions better reflects the current value of such participation. This is a value which is certain and arises from market transactions. Moreover, such transactions were specifically made with the intention of mitigating losses.

399. Consequently, the Tribunal will apply DCF to estimate the value of TGS and of Claimants’ investment (i.e. equity participation in TGS) before the measures were adopted, in particular, before pesification took place. To estimate the current value of TGS and of Claimants’ investment, the Tribunal will use the sale transaction with D.E. Shaw. Both results would then be contrasted with the stock market value. Next, the Tribunal will establish the difference between these two values to calculate the damages suffered by the Claimants as shareholders of TGS. Finally, the Tribunal will consider operator damages and PPI damages (if any) to establish the overall compensation to the Claimants for the Treaty breaches incurred by the Respondent.”
Among the Argentine awards that dealt with the issue of reparations for breaches of the BIT beyond expropriation, the 2005 CMS award provides the clearest and most comprehensive explanation on resort to compensation as a form of reparations under general international law.\textsuperscript{161} At the outset, the CMS tribunal reiterated that compensation “is only called for when the damage is not made good by restitution”, and that there are a plethora of methods for financially assessing damage, such as the “asset value” or “replacement cost” approach; the “comparable transaction” approach; the “option” approach (alternative uses which can be made of the assets in question, and their costs and benefits); and the DCF approach.\textsuperscript{162} While declaring that restitution “is by far the most reliable choice to make the injured party whole”, the CMS tribunal explicitly acknowledged that the Argentine “crisis cannot be ignored and it has specific consequences on the question of reparation.”\textsuperscript{163} The tribunal went on to acknowledge that in the absence of a compensation provision for non-expropriation breaches of the BIT, “the cumulative nature of the breaches…is best dealt with by resorting to the standard of fair market value”,\textsuperscript{164} and adopted the DCF method as the valuation method, subject to some adjustments based on facts specific to the dispute and the tribunal’s own customized valuation model.\textsuperscript{165}

Notably, an arbitral tribunal has declared its disinclination to automatically

\textsuperscript{160} Id. at note 159, paras. 380-382.

\textsuperscript{161} CMS Gas Transmission Company v. Argentina, Award, ICSID Case No. ARB/01/8, 12 May 2005, paras. 399-469.

\textsuperscript{162} Id. at note 163, paras. 401 and 403.

\textsuperscript{163} Id. at note 163, para. 406.

\textsuperscript{164} Id. at note 163, para. 410.

\textsuperscript{165} Id. at note 163, paras. 411, 418-423. See also para. 435: “435. Since the Tribunal was not provided with the algorithms sustaining the figures contained in the TGN forecast prepared in 2000, the Tribunal with the help of its experts, has built its own model…”

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import a BIT’s expropriation provision (which defines compensation according to the “fair market value” standard). In the 2007 *BG Group* award against Argentina, the tribunal opted to refer to compensation under the “fair market value” measure as a matter of damages under customary international law, inferable from the ILC Draft Articles on State Responsibility: “[m]aterial damage here….‘refers to property…which is assessable in financial terms.’…Damages that are ‘too indirect, remote, and uncertain to be appraised’ are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of ‘full reparation’ under the ILC Draft Articles.”

166 These guidelines influenced the tribunal’s factual assessment of the claimed amounts included and excluded from the ultimate compensation awarded.

As may be seen in the above approaches taken in different arbitrations arising from Argentina’s governmental measures during its 2001/2002 financial crisis, the arbitral tribunal has considerable discretion as to the choice of benchmarks to be used for estimating compensation in the form of reparations within the general law of international responsibility. The valuation of the asset after the imposition of the emergency measure also depends on the asset base identified by the experts. The *CMS* tribunal purposely acknowledged that Argentina’s economic crisis would have “specific consequences on the question of reparation”, although the ensuing award did not describe in detail the extent (if any), to which Argentina’s economic predicament mattered in the adjustments made by the *CMS* tribunal under their own customized asset valuation model. Irmgard Marboe argues that it is possible to reflect these considerations for economic emergencies in the valuation model for deriving the quantum of compensation owed:

“…one can observe that economic difficulties of the respondent State are generally not accepted as a reason for diminishing damages in international investment disputes. This appears appropriate in as much as otherwise the process of calculation of compensation and damages by international tribunals would be even less transparent and understandable.

However, economic realities, including financial crises, are and should be reflected in the calculation. For this purpose, however, it is not necessary to rely on equity considerations. While in cases of temporary difficulty the deferral of payment or the payment in installments can be helpful, the appropriate application of objective or subjective valuation methods may well reflect various kinds of macroeconomic fluctuations. A comparison with the hypothetical financial situation of the affected person could and should, for example, reflect the economic crises which would have reduced the financial situation anyway. Furthermore, an appropriate reflection of the risk is possible in various valuation approaches.

The foregoing recommendation focuses on adjusting the valuation model to take an economic emergency or crisis into account, and thereby arrive at the closest approximation of compensation owed by the host State for non-expropriation breaches of the BIT. However, to date this marked emphasis on economic crisis as a basis to mitigate or reduce valuations of compensation still finds scant support in the international investment jurisprudence briefly surveyed here. As will be shown in the next subsection, the host State may have a better case for tempering the quantum of compensation owed for non-expropriatory breaches of the BIT, if it argues that its acts were taken to fulfill its continuing duties under the ICESCR minimum core obligation.

2. The ICESCR minimum core obligation vis-à-vis the general international law of reparations in the form of compensation

Part II.A applied VCLT Article 30 to the conflict between the ICESCR minimum core obligation and a BIT provision for compensation in case of expropriation. VCLT Article 30 will not apply in the case of a conflict between the

167 MARBOE, at p. 152, paras. 3.337 and 3.338.
ICESCR minimum core obligation and the general international law on compensation as a form of reparation as codified in Article 36 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter, ILC Articles), \textit{inter alia}:

\begin{quote}
\textbf{“Article 36. Compensation”}

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.\textsuperscript{168}
\end{quote}

Clearly the conflict at hand exists between a treaty obligation (the ICESCR) and an obligation under customary international law. This type of conflict is not easily resolved, since “between treaty and custom, it is generally accepted that no inherent hierarchy exists between them.”\textsuperscript{169} Article 38 of the Statute of the International Court of Justice does not contain a hierarchy between conventional and customary sources of international law.\textsuperscript{170} While it may be plausibly argued that as a matter of form and the presumed intent of States, a treaty should be granted more preference than custom, it should be emphasized that this argument has scant acceptance among international law scholars.\textsuperscript{171}


\textsuperscript{169} JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (Cambridge University Press, 2003), p. 133 [hereafter, “PAUWELYN”].

\textsuperscript{170} Statute of the International Court of Justice, Article 38.

\textsuperscript{171} Id. at pp. 133-134:

\begin{quote}
“Having noted that, in theory, there is no \textit{a priori} hierarchy between treaty and custom, in practice most cases of apparent, as well as genuine, contradiction between treaty and custom must be decided in favour of the treaty norm. This general rule is
One way to attempt to resolve this normative conflict is for the host State to argue that the ICESCR minimum core obligation is the applicable *lex specialis* that should prevail over the duty to provide compensation under Article 36 of the ILC Articles. Article 55 of the ILC Articles provides that “[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”\(^{172}\) This argument carries its own probative challenges for the host State. For one, it will be incumbent upon the host State to establish that the ICESCR minimum core obligation sufficiently displaces Article 36 of the ILC Articles in terms of the implementation of the international responsibility of the host State arising from non-expropriation breaches of the BIT. This is a difficult position to assume, since nothing in the ICESCR palpably indicates its primacy over other substantive international obligations. Moreover, in order to exclude the applicability of the ILC Articles, the International Law Commission noted that “[i]t will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule…[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”\(^{173}\) This poses another difficulty for the host State,

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\(^{173}\) Id. at p. 140, paras. 3 and 4 of the commentary to Article 55.
since the ICESCR does not contain any exclusionary rules in regard to customary law or treaty law.

While the host State is simultaneously obligated (even during an economic emergency) to observe both the ICESCR minimum core obligation and the customary duty to provide compensation as reparations for non-expropriation breaches of the BIT, this conflict may be resolved by interpreting the content of “compensation” as envisaged under its customary form. As the previous subsection has shown, arbitral tribunals have tended to rely on much the same standard for breaches of non-expropriation provisions of the BIT. However, it should nevertheless be stressed that the tribunals’ authority to transpose such a specific treaty definition of compensation is entirely a matter of discretion. As has been rightly observed, “[t]he customary rule of full compensation is of a very general nature and it does not offer a conceptual framework for the recovery of damages that would be comparable in specificity to the ‘value’ approach generally applicable in expropriation cases. Rather, it provides a general principle, according to which any loss suffered and established must be compensated in full. The generality of the customary rule provides tribunals with flexibility as to what the precise methodology for assessing damages should be in a specific case.”174 Pursuant to the general law of international responsibility and the Chorzów standard, the main duty of an arbitral tribunal would be to ensure that the reparations awarded indeed “wipe out all the consequences of the illegal act.”175 Thus, as the CMS tribunal rightly pointed out, restitution (such as through negotiation) is the preferred (and primary) form of reparation, before contemplating

174 SERGEY RIPINSKY AND KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (BIICL, 2008), at pp. 90-91 [hereafter, “RIPINSKY AND WILLIAMS”]

175 Id. at note 139.
resort to compensation.\textsuperscript{176}

However, there does not appear to be a scientific process for determining the quantum of compensation pursuant to Article 36 of the ILC Articles. As seen in the Argentine cases discussed in the previous section, arbitral tribunals privilege certain factual and economic assumptions as they set pre-crisis and post-crisis asset valuations; determine the foreseeability of the economic crisis and its impact on the risk premium (if any) on the investment; and forecast quantitative estimates of the likely “fair market value” of the investment or the deprivation of the economic benefits of the investment as a result of Argentina’s emergency measures during the 2001/2002 financial crisis. These judgment calls are unique to the arbitral tribunals’ own appreciation of how to approximate the “financially assessable damage” contemplated for compensation as defined in Article 36 of the ILC Articles. Existing arbitration practices show that losses may be categorized according to “full loss of investment’s value”, the “diminution in investment’s value”, “unpaid taxes or contract price”, “loss of dividends by a shareholder”, “losses due to temporary interference”, and “loss of invested amounts”.\textsuperscript{177}

Significantly, the International Law Commission clarified that compensation under Article 36 “is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character…Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach.”\textsuperscript{178} Because this form of compensation is taken from the perspective of the \textit{injured State}, then evidence is admissible on “all relevant facts of

\textsuperscript{176} Id. at note 163, at paras. 406-407.

\textsuperscript{177} RIPINSKY AND WILLIAMS, at pp. 91-92.

\textsuperscript{178} Id. at note 170, p. 99, para. 4.
each incident of damage”. In the 1974 *Fisheries Jurisdiction (Germany v. Iceland)* case,\(^{179}\) the International Court of Justice outlined quite general guidelines for eliciting the appropriate estimate of damages as reparations under the law of international responsibility:

> “76. The documents before the Court do not however contain in every case an indication in a concrete form of the damages for which compensation is required or an estimation of the amount of those damages. Nor do they furnish evidence concerning such amounts. In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law. It is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed…”\(^{180}\)

The Court has not distinguished between the kinds of evidence that it would accept for purposes of determining the quantum of compensation as reparations, although in the 1949 *Corfu Channel* case the Court determined compensation mainly by relying on experts’ technical assessments.\(^{181}\) The International Law Commission has also acknowledged the inherent flexibility of the process of determining the quantum of compensation: “[a]s to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behavior of the parties and, more generally, a concern to reach an equitable and


\(^{180}\) Id. at p. 204, para. 76. Italics added.

acceptable outcome.”

Compensation under Article 36 of the ILC Draft Articles is thus concerned with a broad assessment of damage from the perspective of the injured State, but also with reaching an “equitable” outcome based on the behavior of the parties concerned. For this reason, it may be just as material for the host State to present evidence, not just to dispute the investors’ financial assessment of their losses, but also on the actual fiscal predicament of the host State in relation to the ‘injured State’ (or the State of the nationality of the investor) under the law of international responsibility. This should include, as a ‘relevant fact’, the host State’s continuing obligations to provide the “essential levels” of the ICESCR minimum core obligation, and the extent to which the investor also sought to mitigate its losses foreseeably anticipating such continuing obligations by the host State. The International Law Commission has acknowledged that the scope of reparations may be affected by the degree to which the party injured by a breach of an international obligation exercises prudence to mitigate damages occasioned by the injury: “[a] further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a ‘duty to mitigate’, this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.”

Several arbitral tribunals have applied a similar concept of mitigation of losses, albeit not in the

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183 Id. at p. 93, para. 11 (commentary to the general rule on reparations under Article 29).

184 RIPINSKY AND WILLIAMS, at pp. 322-325.
specific context of adjustments taking into account the host State’s duty to observe the ICESCR minimum core obligation during economic emergencies.

Finally, as a matter of equity, it would not be unreasonable for the arbitral tribunal to adjust the quantum of compensation, in view of the host State’s simultaneous observance of the ICESCR minimum core obligation during an economic emergency. Several arbitral tribunals have relied on “equitable considerations”\(^\text{185}\) to adjust the quantum of compensation taking into account the peculiarity of fact-patterns on a case to case basis:

“...Because of difficulties involved in the precise assessment of damages, subjective elements present in many assessment methodologies and the need for approximations, tribunals are almost inevitably, although to varying degrees, guided by equitable considerations.

...The notion of equity is inherently subjective: a conception of what is equitable or fair in particular circumstances will differ depending on a view-point, so there can be little guidance as to the application of the principle. In this respect, much depends on the personal and collective views and beliefs of the members of the arbitral tribunal and their reading of the facts of the case. Generally, however, in the context of an investment dispute, equitable considerations can well serve as a basis for finding a just balance between private interests of the foreign investor and public interests of the respondent State....”\(^\text{186}\)

Equitable considerations are perfectly suited to situations where adjudication inimitably involves some discretionary ambiguity.\(^\text{187}\) Arbitral tribunals seeking to apply compensation under Article 36 of the ILC articles to non-expropriation breaches of a BIT should acknowledge that they engage in a discretionary exercise. It

\(^{185}\) Id., citing LLAMCO v. Libya, Award of 12 April 1977; Tecmed v. Mexico, Award of 29 May 2003, para. 190; AMT v. Zaire, Award of 21 February 1997, para. 7.16; Kuwait v. Aminoil, Award of 24 March 1982, para. 78; Santa Elena v. Costa Rica, Award of 17 February 2000, paras. 92 and 103; Himurina v. PLN, Final Award of 4 May 1999, para. 237

\(^{186}\) RIPINSKY AND WILLIAMS, at pp. 124-126.

is precisely this level of discretion in the process of determining the quantum of compensation, which should justifiably enable arbitral tribunals to be equally amenable to arguments on equity and fairness arising from the host State’s continuing duty to fulfill the ICESCR minimum core obligation even during an economic emergency.

III. VCLT ARTICLE 31 AND ICESCR-SENSITIVE INVESTMENT TREATY INTERPRETATION

A. Difficulties in Framing the ICESCR within the Investment Treaty Context

In 2007, the European University Institute (EUI) in Florence, Italy, hosted two international conferences whose collection of papers were compiled and published in a pioneering and authoritative volume, entitled Human Rights in International Investment Law and Arbitration. The volume contains many key findings, including observations by Professor Christoph Schreuer and Clara Reiner that “States have to date not introduced claims against investors for breaches of human rights…. [i]nstead host States have relied on human rights considerations defensively to justify measures with adverse effects on the investment, arguing that their treatment of an investor was in furtherance of or necessary to protect human rights commitments… [the awards in CMS Gas v. Argentina, Azurix v. Argentina, and Siemens v. Argentina] seem to indicate the tribunals’ reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves.”

Some scholars have advanced arguments seeking to expand the width of

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188 PIERRE-MARIE DUPUY, FRANCESCO FRANCIONI, AND ERNST-ULRICH PETERSMANN (EDS.), HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Oxford University Press, 2009) [hereafter, “DUPUY, FRANCIONI, & PETERSMANN”].

189 Clara Reiner and Christoph Schreuer, Human Rights and International Investment Arbitration, pp. 82-96, at 89-90 in DUPUY, FRANCIONI, & PETERSMANN.
interpretation of substantive guarantees in investment treaties (such as the fair and equitable treatment standard, particularly its aspect of “legitimate expectations of an investor”, as well as the non-discrimination standard), prescribing proportionality and balancing analysis to accommodate the host State’s duty to observe human rights compliance.190 Despite these efforts, it has been aptly observed that while a few arbitral awards have dealt with matters inimitably involving public interest regulation, such as the landmark finding in Methanex that non-discriminatory environmental regulations cannot amount to expropriation,191 or the finding that the Canada Post fulfills a vital public policy and cultural function in UPS v. Canada,192 the “unique circumstances of these cases or the aberrational nature of their holdings suggest that they do not represent an incipient trend towards a systematic consideration of the public interest in investment treaty arbitration.”193

To date, no host State has fully pleaded human rights-based arguments as independent defenses for apparent breaches of substantive guarantees in an investment treaty. Neither has there been an arbitral award in which the tribunal’s


determination of a BIT breach turned significantly on the issue of the host State’s observance of economic and social rights. In one case, it was the claimants (and not the host State) that invoked the ICESCR as part of the applicable law governing an investment. In the 1999 *Goetz v. Burundi* award,\textsuperscript{194} Belgian shareholders in a mining corporation sued the Republic of Burundi for alleged breaches of obligations under Burundi law, the ICESCR, and the Belgium-Luxembourg/Burundi BIT, when Burundi withdrew the corporation’s free zone regime certificate. The parties reached a settlement agreement, which was incorporated in the arbitral award. The award evidently considered the non-discrimination principle in Article 2(2) of the ICESCR\textsuperscript{195} pursuant to Article 42(1) of the ICSID Convention, but the tribunal ultimately found that the claimants were unable to establish their allegations of discrimination.\textsuperscript{196}

The dearth of arbitral awards directly involving ICESCR rights could be explained by the oblique manner in which the argument has been framed in actual disputes. For example, in the arbitrations involving governmental measures taken during the 2001-2002 Argentine financial crisis, Argentina has to date repeatedly invoked its unique version of the doctrine of necessity (or emergency), arguing that investment treaties do not at all apply during the state of emergency where the Argentine government was simply vindicating constitutionally recognized economic and social rights.\textsuperscript{197} In *National Grid PLC v. Argentina*, Argentina argued that the

\textsuperscript{194} *Goetz and ors v. Burundi*, Award, ICSID Case No. ARB/95/3, 10 February 1999.

\textsuperscript{195} ICESCR Article 2(2) states: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

\textsuperscript{196} *Goetz and ors v. Burundi*, Award, ICSID Case No. ARB/95/3, 10 February 1999, at paras. 94-121.

\textsuperscript{197} DESIERTO, at pp. 171-175.
tariff obligations owed to the investor (an electrical power company) had been lawfully suspended pursuant to the Argentine constitutional provisions on emergency, and that Argentina’s actions “have to be considered in light of all relevant circumstances, including the economic crisis and the primary obligation of the State to assure the transport of electric power at a reasonable price.”\textsuperscript{198} In \textit{Suez and ors v. Argentina}, Argentina mainly discussed the right to water to flesh out its primary argument on the defense of necessity: “Argentina argues that it took the actions it did affecting the Claimants’ investments out of the necessity of dealing with the financial crisis in order to safeguard essential interests. It alleges that the crisis did not result from its own actions but from the crisis that previously struck other parts of the world…it adopted the measures in order to safeguard the human right to water of the inhabitants of the country. Because of its importance to the life and health of the population, Argentina states that water cannot be treated as an ordinary commodity. Because of the fundamental role of water in sustaining life and health and the consequent human right to water, it maintains that in judging the conformity of governmental actions with treaty obligations this Tribunal must grant Argentina a broader margin of discretion in the present cases than in cases involving other commodities and services.”\textsuperscript{199} Precisely because Argentina framed the argument on the right to water within its asserted defense of necessity, the \textit{Suez} tribunal understandably approached the issue from the prism of the elements of necessity in Article 25 of the ILC Articles on State Responsibility:

\begin{quote}
262. \textit{The third condition for the defense of necessity: Treaty obligation does not exclude the necessity defense.} The texts of the three
\end{quote}

\textsuperscript{198} \textit{National Grid PLC v. Argentina}, Award of 3 November 2008, UNCITRAL, para. 78. \textit{See also} paras. 86-90, which discuss the sources of applicable law.

\textsuperscript{199} \textit{Suez and ors v. Argentina}, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, paras. 250 and 252.
BITs in question do not specifically exclude or allow the admissibility of a defense of necessity...Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina’s human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity. Therefore Argentina must be deemed to have satisfied the third condition for the defense of necessity.\footnote{Id. at para. 262. Italics in the original.}

The above reasoning is significant and quite promising, as the Suez tribunal took the position that Argentina could have complied with both its human rights obligations and BIT obligations, but “under the circumstances” of the cases before it, Argentina simply did not discharge the requisite factual burden to show its inability to comply with both sets of obligations at the time of the 2001-2002 crisis. While some challenges could be raised against the accuracy of the tribunal’s factual findings on this point, this is nevertheless a separate question, and one which does not detract at all from what, in my view, was ultimately the important legal conclusion reached by the Suez tribunal: that Argentina was indeed obligated to observe both its human rights and BIT obligations, and Argentina could not simply assert human rights obligations to justify setting aside investment obligations altogether. This is precisely the same recognition underlying the conflict of treaties proposal in Part III for determining the applicable obligation for the host State under VCLT Article 30.

The difficulty with Argentina’s position was that from the beginning it had framed its argument from the standpoint of treaty interpretation (e.g. the BIT
provisions on emergency in relation to the defense of necessity under Article 25 of the ILC Articles). This strategy ended up canalizing the discussion on social and economic rights quite restrictively into Argentina’s interpretation of “necessity” or “emergency” clauses in the BIT. Due to the high probative threshold of Article 25 of the ILC Articles, and the precise textual limitations of the BIT’s “necessity” or “emergency” clauses, it is difficult to subscribe to Argentina’s version of the necessity defence (e.g. the utter inapplicability of the BIT– including the duty to compensate – during the situation of necessity). Finally, Argentina had generally invoked social and economic rights as a matter of constitutional law that, in according to its theory, should automatically displace international investment obligations. While the notion of constitutional supremacy is a licit form of established constitutional reasoning, it would not bear any effect upon the assessment of a State’s international responsibility for treaty breaches. VCLT Article 27 categorically prescribes that a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

**B. Possible gateways for ICESCR-sensitive interpretation in BIT standards**

A host State that chooses to argue an ICESCR-sensitive interpretation of BIT standards ultimately treats the situation as one of conflict-avoidance between the two treaties. It is imperative, however, that the interpretation of the BIT standard to include ICESCR compliance should be plainly justifiable within the terms of VCLT Article 31. This provision vests primary importance on the “ordinary meaning” of the text of the treaty “in their context”, and “in the light of its object and purpose”.

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201 VCLT Article 27.

202 *Pauwelyn*, at pp. 244-247. *See also* Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 Transnational Dispute Management 2 (April 2006).

203 VCLT Article 31(1).
Apart from the treaty text, such “context” comprises “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”;\textsuperscript{204} and “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”\textsuperscript{205} Together with the context, VCLT Article 31(3) declares other matters to be taken into account: 1) “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”;\textsuperscript{206} 2) “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”;\textsuperscript{207} and 3) “any relevant rules of international law applicable in the relations between the parties.”\textsuperscript{208}

1. VCLT Article 31(3)(c) in the interpretation of substantive standards in the investment treaty

Often as not, it is VCLT Article 31(3)(c) (e.g. “relevant rules of international law applicable between the parties”) that acts as a possible gateway for integrating human rights into the interpretation of investment treaty standards. Judge Bruno Simma and Theodore Kill established a careful methodology for using this provision in investment treaty interpretation, showing, first, that there is a presumption of compliance by investment treaties with other relevant rules of international law, and second, that, properly argued, international human rights norms could meet the test of

\textsuperscript{204} VCLT Article 31(2)(a).

\textsuperscript{205} VCLT Article 31(2)(b).

\textsuperscript{206} VCLT Article 31(3)(a).

\textsuperscript{207} VCLT Article 31(3)(b).

\textsuperscript{208} VCLT Article 31(3)(c).
“relevance” under VCLT Article 31(3)(c).\textsuperscript{209} The generally cautious and judicious approach in using VCLT Article 31(3)(c) in investment treaty interpretation finds some support in arbitral practice. For example, in resolving the jurisdictional objections in \textit{RosInvest Co. UK Ltd v. Russian Federation}, the arbitral tribunal took the opportunity to explain the limited function of VCLT Article 31(3)(c), and its disutility for the specific purpose of determining the consent of the parties as the basis of the tribunal’s jurisdiction:

\begin{quote}
39. When it comes to Article 31(3)(c), the position may be different. Here the reference is to ‘any relevant rules of international law applicable in the relations between the parties’. ‘Applicable in the relations between the parties’ must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole. The cases cited by the Claimant relate almost in their entirety to human rights treaties and to the constituent instruments of both international organizations. It is however plain that both of these are special cases: the former (human rights) because they represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes (as has repeatedly been held by national as well as international judicial bodies); the latter (international organizations) because it is generally understood that, given the changing nature of the problems and circumstances international organizations have to confront, a degree of evolutionary adaptation is the only realistic approach to realizing the underlying purposes of the organization as laid down in its constituent instrument. It is difficult to see what bearing any of this might have on the jurisdiction of an arbitral tribunal, which remains, as it always has been, a matter of specific consent by the parties.”\textsuperscript{210}
\end{quote}

As the Simma-Kill article demonstrates, the reference to “relevant rules of


international law applicable in the relations between the parties” is a term of art, and
one that cannot be used loosely to justify virtually any expansion of the applicable
law beyond the investment treaty. While several arbitral tribunals have had little
difficulty using VCLT Article 31(3)(c) in the course of investment treaty
interpretation, noticeably few arbitral tribunals to date have used this provision to
justify a specific reference to human rights treaties in the interpretation of investment
treaty standards. In its 2008 Decision on Jurisdiction and Admissibility, the arbitral
tribunal in Micula and ors v. Romania invoked VCLT Article 31(3)(c) to support its
consideration of Article 15 of the Universal Declaration of Human Rights, in the
process of interpreting a BIT’s nationality requirements for investors. The Saluka
Investments BV v. Czech Republic arbitral tribunal also depended upon VCLT article
31(3)(c), in order to take account of the customary international law principle “that a
deprivation can be justified if it results from the exercise of regulatory actions aimed
at the maintenance of public order.” While the amici curiae in Biwater Gauff v.

211 Id. at note 211, at pp. 678-707.
213 Micula and ors v. Romania, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, 24 September 2008, at paras. 86-88.
214 Saluka Investments BV v. Czech Republic, Partial Award, PCA (UNCITRAL), 17 March 2006, at paras. 254-255:

“254. The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very
broadly and does not contain any exception for the exercise of regulatory power. However, in using
the concept of deprivation, Article 5 imports into the treaty the customary international law notion that
a deprivation can be justified if it results from the exercise of regulatory actions aimed at the
maintenance of public order. In interpreting a treaty, account has to be taken of ‘any relevant rules of
international law applicable in the relations between the parties’ – a requirement which the
International Court of Justice (ICJ) has held includes relevant rules of general customary international
law.
Tanzania argued generally for a human rights-sensitive interpretation of a BIT, on the reasoning that “human rights and sustainable development issues are factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations as between the investor and the host State,” the tribunal merely took the observation into consideration in its assessment of the investor’s acts and omissions, and not with respect to specific standards of the BIT. Insofar as the arbitral awards arising from the 2001-2002 Argentine crisis are concerned, Argentina’s arguments based on human rights norms do not appear to have been advanced through VCLT Article 31(3)(c) in a manner akin to the precision advocated in the Simma-Kill methodology.

The minimal use of VCLT Article 31(3)(c) could possibly be explained by its subordinate role in relation to the ordinary meaning of the text of the treaty. As maintained by the arbitral tribunal in *Berschader and Berschader v. Russian Federation*, resort to such “relevant rules of international law applicable to the

255. It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.”


216 Id. at para. 601.

217 *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 25 April 2005, paras. 114, 121 [“In this case the Tribunal does not find any such collision (between the Argentine Constitution and the arbitration. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.); *Siemens AG v. Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8, 6 February 2007, at para. 79 (“79. … In this respect, the Tribunal notes the reference made by Argentina to international human rights law ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law. This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, prima facie, bears any relationship to the merits of this case.”); *Azurix Corporation v. Argentina*, Award, ICSID Case No. ARB/01/12, 23 June 2006, at para. 261 (“261. The Respondent has also raised the issue of the compatibility of the BIT with human rights treaties. The matter has not been fully argued and the Tribunal fails to understand the incompatibility with the specifics of the instant case. The services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service.”).
relations between the parties” should be made only where “the terms of the Treaty are unclear or require interpretation or supplementation”. The Azurix ad hoc annulment committee emphasized that while it “accepts that a treaty may need to be interpreted against the general fabric of customary international law”, it should likewise be acknowledged that “except where norms of ius cogens are involved, a treaty is capable of modifying the rules of customary international law that would otherwise be applicable as between the States parties to the treaty. Indeed, often the very purpose of a treaty is to effect such a modification…Hence the starting point in determining the effect of the treaty is the terms of the treaty itself, rather than the principles of customary international law that may or may not be displaced by the treaty provisions.” Where the terms of the investment treaty do not facially appear to contain any discernible reference to, bear out any linkage with, international human rights norms, it is understandable that arbitral tribunals would be reluctant to use VCLT Article 31(3)(c) as an all-purpose gateway for human rights-sensitive interpretation. It is perhaps due to the difficulties of strained interpretation that the new generations of international investment agreements contain language that purposely adopts, or refers to, international human rights standards, such as labor standards, corporate social responsibility concepts, and environmental standards.

2. The ICESCR minimum core obligation and investment “in accordance with host State law”


219 Azurix Corporation v. Argentina, Decision on Application for Annulment, ICSID Case No. ARB/01/12, 1 September 2009, at para. 90.


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Professors Christoph Schreuer and Ursula Kriebaum have recently taken the view that “in accordance with host State law” clauses in investment treaties could “offer additional possibilities to take community interests into account. Where international law is incorporated into domestic law its relevant provisions are also applicable.”

This view shares similarities with an earlier opinion expressed by Professor Pierre-Marie Dupuy:

“…When, in particular, the national Constitution of the host State contains an option in favour of monism granting primacy to public international law, the latter partakes in the law applicable to the dispute. This does not mean that the concerned state will be able without constraint to avail itself of the relevant provisions of its Constitution so as to shun its obligations towards the foreign investor but when negotiating a contract with a host State, the potential investor should take due notice of the constitutional law that could affect the implementation or interpretation of its contract with that state…in a number of cases, not only the constitutional legal framework of a given state must be taken into account, but also the case law of its national courts and tribunals as to what is deemed to be prohibited by the national public policy (‘ordre public national’). Such prohibitions indeed often refer to the protection of fundamental human rights.”

Stephan Schill describes the “in accordance with host State law” clauses as usually appearing in investment treaties in two forms: “first, [as] clauses that tie compliance with domestic law directly to the definition of ‘investment’ protected under international investment treaties; and second, [as] clauses linking compliance with domestic law to the provision on admission of new investments coupled with a limitation of the scope of the application of the relevant investment treaty to existing

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investments made in accordance with host State law.”

While many investment treaties contain legality clauses, or clauses stipulating that a covered “investment” should be one that is made “in accordance with or in conformity with the laws of the host State”, the formulations and consequent effects of these clauses could also vary as to the scope of host State law contemplated. The 2009 ASEAN-China Investment agreement, for example, refers to ‘investment’ as “every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies of another Party in the territory of the latter…”, with a footnoted clarification (“[f]or greater certainty, policies shall refer to those affecting investment that are endorsed and announced by the Government of a Party, and made publicly available in a written form.”)

In general, however, there is a fair preponderance of legal opinion in favor of the position that the “in accordance with host State law” clause does not operate to disqualify investment from treaty protection for just any kind of breach of the host State’s laws, such as minor administrative errors. The arbitral tribunal in Fraport AG Frankfurt Airport Services Worldwide v. Philippines carefully distinguished

223 Stephan Schill, Illegal Investments in Investment Arbitration, working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979734 (last accessed 5 March 2012). An example of two “in accordance with laws and regulations” clauses that fulfill the two functions described by Schill are Articles 3(2) and 3(3) of the Croatia BIT discussed in paras. 190 and 197 of MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Award, ICSID Case No. ARB/01/7, 25 May 2004.


226 Tokios Tokeles v. Ukraine, Decision on Jurisdiction and Dissent, ICSID Case No. ARB/02/18, 29 April 2004, at para. 86 (“…Even if we were able to confirm the Respondent’s allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.”)
breaches of fundamental laws of the host State, as opposed to good faith mistakes or errors: “[w]hen the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host State may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent legal counsel’s legal due diligence report to flag that issue.”

While it has been found in some instances that the “in accordance with host State law” clause has been deemed quite restrictively to refer to the organization of an investment pursuant to the host State’s corporate registration or approval requirements, a recent line of decisions appear to suggest that this clause could also extend to broader considerations, in affirmation of the clause’s primary teleological purpose “to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.” Accordingly, an investment’s compliance with host State law has been deemed to encompass serious criminal prohibitions or violations of international public policy, such as the

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227 *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, ICSID Case No. ARB/03/25, 16 August 2007, at para. 396. See also *Parkerings-Compagniet AS v. Lithuania*, Award on Jurisdiction and Merits, ICSID Case No. ARB/05/8, 14 August 2007, para. 307 (finding that failure to disclose a legal opinion to a counter-party before entering into an Agreement does not in itself amount to a breach of international law).

228 *Veteran Petroleum Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009, at paras. 20-21; *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN Case No. ARB/01/1, 31 March 2003, at para. 62; *Siag and Vecchi v. Egypt*, Decision on jurisdiction and partial dissenting opinion, ICSID Case No. ARB/05/15, 11 April 2007, at paras. 198-201; *Middle East Cement Shipping and Handling Co SA v. Egypt*, Award, ICSID Case No. ARB/99/6, 12 April 2002, paras. 131-138.

investor’s violations of anti-dummy legislation in *Fraport v. Philippines*, outright bribery in *World Duty Free v. Kenya*, and fraud in *Inceysa Vallisoletane v. El Salvador*.230 Even as the *Inceysa* tribunal held that it was the sole authority that could make the determination of legality for purposes of deciding its jurisdiction (and consequently it was of no moment that domestic courts had reached previous findings on the illegal character of the investment),231 it was nevertheless able to extrapolate general principles of law as part of the “relevant rules of international law” applicable to the investment under the BIT, such as the principle *nemo auditor propiam turpitudinem* (“no one can be heard to invoke his own turpitude”), international public policy (e.g. “a series of fundamental principles that constitute the very essence of the State”), and the principle prohibiting unlawful enrichment.232

Moreover, the fundamental importance of the regulation, law, or domestic requirement has to be proven in order to impute the necessity of its inclusion in the due diligence to be conducted by the investor and the host State.233 In the 2010 award in *Anderson and ors v. Costa Rica*, the tribunal found that it lacked jurisdiction *ratione materiae* since the investment was not “made” or “owned” in accordance with the laws of Costa Rica, which included Central Bank regulations on authorized

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230 Id. at note. 227; *World Duty Free Company Ltd. v. Kenya*, Award, ICSID Case No. ARB/00/7, 25 September 2006; *Inceysa Vallisoletane SL v. El Salvador*, Award, ICSID Case No. ARB/03/26, 2 August 2006.

231 Id. at note 229, at paras. 212-213.

232 Id. at note 229, paras. 230-257.

233 See, however, a host State’s unsuccessful attempt to argue the “non-resident” character of tax treatment in order to deny that an investment met the territorial requirement “in accordance with its laws and regulations”, in *SGS Societe Generale de Surveillance SA v. Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004, at paras. 99-112.
financial intermediation.\textsuperscript{234} The Anderson tribunal was explicit in how it demarcated administrative regulations and requirements from those deemed decisive for a BIT-protected investment under an “in accordance with host State law” clause: “[n]ot all BITs contain a requirement that investments subject to treaty protection be ‘made’ or ‘owned’ in accordance with the law of the host country. The fact that the Contracting Parties to the Canada-Costa Rica BIT specifically included such a provision is a clear indication of the importance that they attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed…Costa Rica, indeed any country, has a fundamental interest in securing respect for its law. It clearly sought to secure that interest by requiring investments under the BIT to be owned and controlled according to law. At the same time, prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous or unreasonable.”\textsuperscript{235}

If the foregoing recent approaches are applied with respect to treaty obligations under the ICESCR, then to the extent that the ICESCR minimum core obligation could be deemed part of a host State’s law, it may be argued that the “in accordance with host State law” clause in an investment treaty could indeed furnish a basis for ICESCR-sensitive interpretation. However, this interpretation has to be built on clear foundations in the treaty’s text, context, object and purpose. The treaty’s terms, structure, and drafting history would also require scrutiny. The host

\textsuperscript{234} Anderson and ors v. Costa Rica, Award, ICSID Case No. ARB (AF)/07/3, 10 May 2010, para. 55-59.

\textsuperscript{235} Id. at note 236, at paras. 53 and 58.
State would have to demonstrate the extent to which the ICESCR forms a crucial part of its domestic legal system; whether the same is deemed to be self-executing or has already been domestically transformed through legislative enactment; and the extent to which the investor, at the time of establishment of its investment, had the reasonable opportunity, in good faith, to know and be informed of, the requirements of the ICESCR minimum core obligation with respect to the host State.

Finally, the host State would also be burdened to show the centrality of ensuring its continued observance of the ICESCR minimum core obligation even in economic emergencies, and not adopt such an argument as a mere afterthought or pretext to deny investment treaty protection to what would ordinarily be covered investments. One way to discharge this burden is to show that the host State had purposely designed its prospectuses, terms of reference, and the due diligence process in a manner that does not only encompass corporate registration and regulatory requirements, but also to include continuing international obligations that impact upon its current and future fiscal position, such as the maintenance of the minimum “essential levels” of its ICESCR core obligations even during economic emergencies. The precise (or at the very least, the ascertainable) content of the ICESCR core obligation during economic emergencies in the host State should also be clarified ex ante. Drawing from the Fraport tribunal’s careful methodology, if the substance of host State law – such as the ICESCR minimum core obligation - is not previously clarified and brought to the attention of investors at the outset, the investor’s minor mistakes or incidental regulatory non-compliance, when made in good faith, should not deprive an investment of the benefit of treaty coverage and protection.

IV. THE PRINCIPLE OF POLITICAL DECISION: HOST STATES AND THE REALIST CALCULUS OF TREATY COMPLIANCE
Assuming that the host State cannot resort to application of the conflict of treaties method in VCLT Article 30, or methods of treaty interpretation under VCLT Article 31, the host State is therefore left with a pure policy choice situation where it must determine performance of either the ICESCR minimum core obligation, or the investment treaty duty to pay compensation at a given point in time. This situation could be described according to the “principle of political decision”, where, according to Jan Klabbers, “in case of such an unsolvable treaty conflict, the responsible party will eventually have to choose which commitment to honour, and make sure that it compensates the other treaty partner or partners. Essentially, then, this amounts to an admission that any answers need to be found in the law of state responsibility; the law of treaties does not provide them – and this, in turn, is the direct consequence of the choice made by the drafters of the Vienna Convention to focus as treaties as instruments rather than as obligations: form, rather than substance.”236 While the hard choice between compliance with the ICESCR minimum core obligation or compliance with the investment treaty duty to compensate, during an economic emergency, has not materialized in actual international practices, it is not entirely an unforeseeable one, given the modern vulnerabilities of host States (most especially developing countries) to regional economic and financial crises, and the continuing inequity of property entitlements and real income distributions within these States.237


At this stage in the calculus of policy options left to the host State’s authoritative decision-makers (and where neither conflict of treaty rules or treaty interpretation rules apply), I submit that the legitimacy of the ultimate political decision of the authoritative decision-makers within the host State could still be gainfully scrutinized under a constitutive decision-making process affirmative of a public order of human dignity. In 1967, Myres McDougal, Harold Lasswell, and W. Michael Reisman proposed their analytical framework for the policy-making choices of States in *The World Constitutive Process of Authoritative Decision*.\(^{238}\) The authors recognized that:

“A world constitutive process of authoritative decision includes the establishment of an authoritative decision process in the world community, and its subsequent maintenance, modification, or even termination…”

The world community is the scene of many effective decisions that involve more than one of the organized bodies-politic conventionally called nation-states. Specialized institutional practices cross boundaries; there are, for example, arrangements for sending and receiving negotiating agents and expectations have arisen about their treatment. These expectations include the assumption that if the decision-elite of one body-politic violates the usual freedom given to the agents of another, the elite of the latter will adopt deprivational measures against the offending state. Clearly it is a question of arrangements that are genuinely effective across particular boundaries, and that are sustained by sanctions of potential severity, sanctions of noncooperation or even of organized violence.

The example demonstrates a decision process going beyond effective power and including the characteristic features of authority: the prescriptive norm refers to the management of agents and it is assumed that sanctions are properly used if in a contingent factual situation, the norm is disregarded. By authority is meant *expectations of appropriateness in regard to the phases of effective decision processes*. These expectations specifically relate to personnel appropriately endowed with decision-making power; the objectives they should pursue; the physical, temporal, and institutional features of the situations in which lawful decisions are made; the values which may be used to sustain decision, and so forth…Genuine expectations of authority are discerned by contextual examination of past decision as well as by the utilization of all

the techniques of the social sciences for assessing the current subjectivities of individuals. In the optimum public order which we recommend, *the expectations of all individuals equally comprise authority*...An instrumental goal of a public order of human dignity is of course *the equipping of all individuals for full participation in authoritative decision.*\(^{239}\)

The authoritative decision must be effective, and not merely aspirational. To this end, the authors identify five fundamental problem-solving tasks for the decision-maker:

“1. Clarification of the goals of decision;
2. Description of the trends toward or away from the realization of these goals;
3. Analysis of the constellation of conditioning factors that appear to have affected past decision;
4. Projection of probable future developments, assuming no influence by the observer;
5. Formulation of particular objectives and strategies that contribute, at minimum net cost and risk, to the realization of preferred goals.”\(^{240}\)

Applying these tasks to the problem at hand for authoritative decision-makers in host States will not necessarily yield an *ex ante* clear-cut preference for either the performance of the ICESCR minimum core obligation or that of the investment treaty duty to pay compensation. Much will depend on the particular fiscal circumstances of the host State in a given economic emergency, and the factual contours of the quandary in which it has to choose performance of the ICESCR minimum core obligation vis-à-vis the investment treaty duty to pay compensation. For one thing, authoritative decision-makers in host States owe their mandate, as well as bases of power, to many constituencies - from the domestic voter population, influential party alliances, as well as possibly to external institutions that may also have an interest in ensuring the uninterrupted flow of continued financial assistance to a host State

\(^{239}\) Id. at note 240, pp. 255-266. Italics added.

\(^{240}\) Id. at note 240, pp. 258-259.
during the economic emergencies. If the goal of the host State’s authoritative
decision-maker is to achieve the maximal level of socioeconomic protection for its
citizens during the economic emergency, its allocation of governmental resources to
meet the ICESCR minimum core obligation appears, at first glance, to be entirely
well-justified. However, where governmental fiscal resources are scarce, and the host
State is impelled to seek recourse to external sovereign financing to ensure continued
socioeconomic protection of its vulnerable domestic population, it may not serve the
interests of the host State to adopt a “beggar thy neighbor” position, such as
arbitrary foreign exchange controls and currency depreciations, unlimited borrowing
from emergency funds in international financial institutions (with the full intention of
summarily and unilaterally repudiating these obligations altogether), or purposely
interfering with trade flows to cut imports and induce a domestic trade surplus. Host
States should also consider trends of its decisions in realizing socio-economic
protection during economic emergencies, and identify for itself factors that could
have affected their past decisions. Host States should also take into consideration the
likely impact of non-performance of one international obligation relative to the other,
and formulate the least-costly strategy for performance of the international obligation
that best contributes to its goal of socio-economic protection during the economic
emergency. Clearly, the political decision to perform one international obligation, at
the expense of the other during the emergency will be a matter for policy calibration.

Finally, it is important for the authoritative decision-makers of the host State
to acknowledge that their choices between performing one international obligation
(and not the other) do not take place in a vacuum. The state of the global political
economy – and the interrelationships between markets, labor, institutions, and

241 See WORLD BANK DEVELOPMENT REPORT (1987), at p. 139. See also TIM WEITHERS, FOREIGN
EXCHANGE: A PRACTICAL GUIDE TO FX MARKETS (Wiley and Sons, 2011); JENS-UWE WUNDERLICH
AND MEERA WARRIER, A DICTIONARY OF GLOBALIZATION (Taylor & Francis, 2007), at p. 47.
financing – bears significance for the achievement of the host State’s goals during the economic emergency. Obviously, resource endowments and monetary capabilities will differ between developed country host States, and developing country host States. However, it is developing country host States that will be most challenged to provide socioeconomic protection and observe the ICESCR minimum core obligation during economic crises, and will most likely face the political choice between performance of the ICESCR minimum core obligation or the investment treaty duty to compensate. The United Nations’ 2012 Report, entitled *World Economic Situation and Prospects*, observed that the international sovereign debt crisis in the Eurozone and fragilities in the international financial markets were significantly affecting development financing and sources of international credit, and described the policy tensions for developing countries in the crisis climate:

“Developing countries face different dilemmas. On the one hand, they need to protect themselves against volatile commodity prices and external financing conditions, in some cases through more restrictive macroeconomic policies. On the other hand, they need to step up investment to sustain higher growth and reorient their economies towards faster poverty reduction and more sustainable production…

…the short-term policy concern for many developing countries will be to prevent rising and volatile food and commodity prices and exchange-rate instability from undermining growth and leading their economies into another boom-bust cycle. These countries would need to ensure that macroeconomic policies are part of a transparent counter-cyclical framework that would include the use of fiscal stabilization funds and strengthened macroprudential financial and capital-account regulation to mitigate the impact of volatile commodity prices and capital inflows.

…[t]he third challenge will be to redesign fiscal policy – and economic policies more broadly – in order to strengthen its impact on employment and aid in its transition from purely a demand stimulus to one that promotes structural change for more sustainable economic growth…The optimal mix of supporting demand directly through taxes or income subsidies or indirectly through strengthening supply-side conditions, including by investing in infrastructure and new technologies, may vary across countries, but in most contexts, direct Government spending tends to generate stronger employment effects.
The fourth challenge is to find greater synergy between fiscal and monetary stimulus, while counteracting damaging international spillover effects in the form of increased exchange-rate tensions and volatile short-term capital flows. This will require reaching agreement at the international level on the magnitude, speed and timing of quantitative easing policies within a broader framework of targets to redress the global imbalances. This, in turn, will require stronger bilateral and multilateral surveillance, including through more thorough assessment of spillover effects and systemic risks...

The fifth challenge is to ensure that sufficient resources are made available to developing countries, especially those possessing limited fiscal space and facing large development needs...Apart from delivering on existing aid commitments, donor countries should consider mechanisms to delink aid flows from their business cycles so as to prevent delivery shortfalls in times of crisis, when the need for development aid is at its most urgent.²⁴²

Considering the reality of developing countries’ dependence on international support and development financing particularly in times of economic crisis, it is recommended that the authoritative decision-makers of the host State exert utmost efforts to observe the ICESCR minimum core obligation without need of resorting to a unilateral repudiation of investment treaty obligations. Temporary non-performance of the duty to compensate investors during an economic emergency is one thing, but rejecting any degree of future international responsibility outright for the non-performance exposes the host State to a myriad of domino consequences in the international sphere. These could include the possible reluctance of sovereign creditor states to lend development financing; the increased political risk that could deter future foreign investment flows and sources of capital to the host State, as well as a litany of potential inter-State suits in the event that investors’ States of nationality adopt and elevate their claims against the host State through diplomatic protection. A host State can indeed choose to prioritize the ICESCR minimum core obligation

during an economic emergency (and possibly defer or restructure payment of investor compensation), without jeopardizing its future prospects of economic growth and development as a responsible member of the contemporary community of nations. In order to make the functionally-appropriate and contextually-legitimate political decision between performing the ICESCR minimum core obligation and the investment treaty duty to compensate at a time of economic emergency, the host State’s authoritative decision-makers must confront and embrace these very same complexities of governing.

CONCLUSION: INVESTMENT, WELFARE, AND ECONOMIC EMERGENCIES

A postmodern neoliberal truth frequently asserted is that international investment directly impacts upon human welfare. Depending on the circumstances of their introduction to, and maintenance within, a national economy, foreign investment may prove to be welfare-increasing or welfare-reducing. For example, when foreign investors operate with fewer transaction costs than their domestic counterparts, “foreign investment may decrease national welfare due to the transfer of profits to foreigners, even when the increase in the rate of growth has a positive effect on welfare. Foreign investment increases welfare only if the increase in productivity is great enough to compensate for the loss of profits…” On the other hand, foreign investment that is appropriate to a State’s comparative advantages, resource capabilities, and economic needs could indeed redound to the benefit of the national welfare: “[g]iven the appropriate host-country policies and a basic level of


development, a preponderance of studies shows that FDI [foreign direct investment] triggers technology spillovers, assists human capital formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development. All of these contribute to higher economic growth, which is the most potent tool for alleviating poverty in developing countries. Moreover, beyond the strictly economic benefits, FDI may help improve environmental and social conditions in the host country by, for example, transferring ‘cleaner’ technologies leading to more socially responsible corporate policies.”

Clearly, foreign investment has the dual potential to yield positive benefits, as well as negative consequences for, national economies, local communities, and human capabilities. Foreign investment can thus affect the “inherent dignity of the human person”, by contributing to the material conditions of “the [human rights] ideal of free human beings enjoying freedom from fear and want…whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”

States influence the relationship between foreign investment and human welfare within their respective jurisdictions. To the extent that States translate policy preferences into the ex ante design of their international investment agreements (IIAs), they define the regulatory environment which, in their view, is best suited for attracting, managing, and maintaining desirable, sustainable, and optimal levels of

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foreign investment. While the actual ability of international treaties to accomplish this objective (and the precise empirical contribution of such treaties to the realization of positive economic and social outcomes) remains a fertile subject of academic dispute, it is nevertheless clear that, at the threshold of concluding an IIA (and long before admitting the entry of foreign investment into one’s jurisdiction pursuant to the IIA), a host State possesses the vast monopoly of police power and regulatory authority. When the host State concludes the IIA, the host State voluntarily commits itself to constrain its regulatory authority over time, through IIA provisions that require the host State to observe certain obligations in relation to investors and investments from the counterpart State. The IIA governs investment relationships between the States parties to this treaty. As such, the ultimate quality (and not just the empirical quantity) of foreign investment thus depends, for the most part, on the host State’s authoritative decision-makers, and how judiciously they exercise the State’s treaty-making powers to create positive welfare effects for the host State’s citizens.

Economic emergencies powerfully test the durability of IIA design. The challenges to the binding applicability of an IIA are never more acute than when a host State has to respond quickly during economic emergencies, in order to ensure the continued protection of the international social and economic rights of its citizens. Admittedly, the precise content, scope, and applicability of these particular set of

248 See United Nations Conference on Trade and Development (UNCTAD), The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries (2009), at pp. 14-26 (showing that IIAs contribute to the “coherence, transparency, predictability, and stability of investment frameworks of host countries”, at p. 25).

rights during economic emergencies can vary from case to case, unlike the specific non-derogable civil and political rights that apply even during public emergencies (e.g. the right to life and the prohibition against the arbitrary deprivation of life; prohibition against torture or cruel, inhuman or degrading treatment; prohibitions against slavery and servitude; prohibition against imprisonment for inability to fulfill contractual obligations; prohibition against ex post facto laws and bills of attainder; the right to recognition as a person before the law; and rights to freedom of thought, conscience and religion). While the ICESCR does not contain a comparable “public emergency” or “non-derogability” provision as in Article 4(1) of ICCPR, Article 4 of the ICESCR nonetheless makes it explicit that the State “may subject such [ICESCR] rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” As established in Part I, the ICESCR minimum core obligation remains binding even during an economic emergency.

Some of the newer generations of IIAs have opted to purposely design human rights-sensitive standards as part of the substantive guarantees in these treaties. The 2004 Model US BIT contains specific provisions on environmental and labor

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250 International Covenant on Civil and Political Rights, Art. 4(2) in relation to Arts. 6, 7, 8(1), 8(2), 11, 15, 16, 18, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967). [hereafter, “ICCPR”]

251 ICCPR Art. 4(1) provides: “1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

252 ICESCR Art. 4.
protection, a development that is similarly observable from the 2004 Model Canadian FIPA, and in other BITs concluded by the Belgium-Luxembourg Economic Union. The 2002 Austria-Malta BIT expressly provides for the


“Article 12: Investment and Environment
1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.
2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 13: Investment and Labor
1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.
2. For purposes of this Article, “labor laws” means each Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:
   (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor;
   (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
   (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.”


“Article 11 Health, Safety and Environmental Measures
The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.”

application of the European Convention on Human Rights in disputes arising from the BIT. These provisions have not yet been tested and interpreted in concrete disputes, but they are well worth examining for future research into IIA design.

Quite idiosyncratically, however, there is no investment treaty to date that makes any explicit reference to the ICESCR, or for the preservation of the host State’s policy space to implement ICESCR obligations during the life of an investment. Apart from exploring the options of conflict of treaties, treaty interpretation, political decision shown in Parts II to IV, deliberately integrating the ICESCR into the design of future generations of international investment agreements could also be an additional and prudent policy option for host States. At the very least during the treaty drafting stages, the host State retains the full opportunity to plan its future responses to the mutual and simultaneous claims of human rights and investment protection during economic emergencies.

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Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments, 29 May 2002, Article 18(2).